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LAW REFORM AND DEVELOPMENT COMMISSION

**CUSTOMARY LAW AND THE CONSTITUTION
- A Background and Discussion Paper -**

by
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of Namibia

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FOREWORD

The adoption of a Constitution with a Bill of Rights raises a number of Constitutional questions relating not only to the recognition of customary law as a legitimate system of law in Namibia but also its application vis-à-vis the Bill of Rights. For instance, whereas the Bill of Rights guarantees equality before the law to all, it also recognises the right to culture which may or may not contradict the equality provision of the Commission. This is one of the questions addressed in this discussion paper. At the same time, traditions are not static but are in a process of constant adaptation to new situations arising as a result of socio-economic developments. The question is about finding the right balance in safeguarding a person's cultural identity whilst also enjoying the benefits provided for by modern economic and educational opportunities in a world with a different value system. There are so many questions and so few answers.

Because of the importance of the issue for the mission of the Law Reform and Development Commission (LRDC), it commissioned this paper on Customary Law and the Constitution to serve as a discussion document. Its main purpose is to provide a mind setting frame for customary law research as well as to sensitise and provoke debate on the constitutional issues related with law reform in customary law matters. The LRDC is particularly pleased that Professor Bennett who is a very well-known expert in the field of customary law and constitutional matters was available to undertake the task of this report. In addition, I wish to express my gratitude to the Ministry of Justice's Legal Capacity Building Programme supported by the Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ) which, apart from financing the expertise and the printing, also accompanied the process of completion of the printed report through its different phases.

The commissioned Report has been submitted to the LRDC and adopted as a working document. While a preliminary discussion was held by the LRDC with Prof. Bennett and it was further agreed to publish the report as a LRDC discussion document, the views expressed in this publication does not necessarily reflect the views of the LRDC in all respects. The LRDC will make recommendations on this matter only after public comment has been received and field research results have been received and discussed.

The LRDC takes this opportunity to present this paper as a good start in stimulating discussion and reflection on the issue. Interested members of the public are welcome to send comments to the LRDC in any of the Namibian languages.

Be assured of the LRDC's commitment in addressing these questions and numerous problems through its law reform efforts and that you will always be invited to participate in shaping the direction for the proper development of the law which affects you in your daily life.

Adv. Bience Gawanas
Chair
Law Reform and Development Commission

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ABBREVIATIONS

Afr J Int & Comp L	African Journal of International and Comparative Law
Afr L Studies	African Law Studies
Afr Studies	African Studies
Am Indian LR	American Indian Law Review
Am J Comp L	American Journal of Comparative Law
Am Pol Sci Rev	American Political Science Review
Am J Int L	American Journal of International Law
AC	Appeal Court
Annual Rev Anthropol	Annual Review of Anthropology
Australian LJ	Australian Law Journal
BAC	Bantu Appeal Court
Bennett Application	T W Bennett The Application of Customary Law in Southern Africa (1985)
Bennett Sourcebook	T W Bennett A Sourcebook of African Customary Law for Southern Africa (1991)
Brit J L & Soc	British Journal of Law and Society
Calif LR	California Law Review
Cambridge LJ	Cambridge Law Journal
Canadian Bar Rev	Canadian Bar Review
Canterbury LR	Canterbury Law Review
CILSA	Comparative and International Law Journal of Southern Africa
Cornell Int LJ	Cornell International Law Journal
Development SA	Development Southern Africa
East African LJ	East African Law Journal
Feminist Rev	Feminist Review

ABBREVIATIONS

Harvard LR	Harvard Law Review
Hastings Int & Comp LR	Hastings International and Comparative Law Review
Human Rights LJ	Human Rights Law Journal
ICJ Review	International Commission of Jurists Review
ICLQ	International and Comparative Law Quarterly
IECL	International Encyclopaedia of Comparative Law
ILM	International Legal Materials
ILR	International Law Reports
Int J Law & Family	International Journal of Law and the Family
Int J Sociology L	International Journal of the Sociology of Law
J Afr Admin	Journal of African Administration
J Afr History	Journal of African History
J Afr Studies	Journal of African Studies
J Family Law	Journal of Family Law
J Historical Sociology	Journal of Historical Sociology
J Law & Society	Journal of Law and Society
J Legal History	Journal of Legal History
J Legal Pluralism	Journal of Legal Pluralism and Unofficial Law
J Local Admin Overseas	Journal of Local Administration Overseas
J Mod Afr Studies	Journal of Modern African Studies
JAL	Journal of African Law
JSAS	Journal of Southern African Studies
Law & Soc R	Law and Society Review
Lesotho LJ	Lesotho Law Journal
LQR	Law Quarterly Review
Manitoba LJ	Manitoba Law Journal
McGill LJ	McGill Law Journal
MLR	Modern Law Review

NAC	Native Appeal Court
Nigerian Current LR	Nigerian Current Law Review
Nigerian J Contemp L	Nigerian Journal of Contemporary Law
Nigerian LJ	Nigerian Law Journal
Oxford J Legal Studies	Oxford Journal of Legal Studies
Rev Ghana L	Review of Ghana Law
Rev Int Droit Comparé	Revue International du Droit Comparé
SA Public Law	South African Public Law
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
Saskatchewan LR	Saskatchewan Law Review
Stellenbosch LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
Univ Ghana LJ	University of Ghana Law Journal
Univ Pennsylvania LR	University of Pennsylvania Law Review
Univ Toronto LJ	University of Toronto Law Journal
Vanderbilt J Trans L	Vanderbilt Journal of Transnational Law
Verfassung und Recht	Verfassung und Recht in Übersee
Victoria Univ Wellington LR	Victoria University of Wellington Law Review
Wisconsin LR	Wisconsin Law Review
Yale LR	Yale Law Review
Zambia LJ	Zambia LJ
Zimbabwe LR	Zimbabwe Law Review

THE RELATIONSHIP BETWEEN CUSTOMARY LAW AND THE CONSTITUTION

SUMMARY OF THE REPORT

AND

ISSUES FOR DISCUSSION

I INTRODUCTION

All citizens are clearly entitled to enjoy the fundamental rights and freedoms contained in ch 3 of the Constitution. None the less, people observing distinctive cultural traditions, and thus distinctive systems of customary law, should be entitled to diverge from the national standard. It follows that the various organs of the Namibian state should accord customary law due respect.

This report seeks to identify conflicts between human rights and the rules of customary law, and in certain cases it attempts to resolve or reconcile those conflicts. In such an inquiry, it must first be established when customary law is applicable to legal proceedings. The conflict of personal laws, a discipline that provides choice of law rules to decide which law applies to the facts of any given case, governs this decision.

If a rule of customary law is deemed to be applicable, its authenticity must be checked. The law most readily available for use in litigation will be a written source in which the rules governing a particular jural community were recorded. However, the validity of custom rests on its actual observance, and, if the documented version is not realized in current social practice, a more authentic law will have to be discovered.

If the issue involves a private relationship, a decision must then be made whether one of the constitutional rights is applicable. All human rights were traditionally supposed to operate 'vertically' to regulate relationships between citizens and the state. 'Horizontal' application of constitutional norms has only recently been allowed, and then only under certain conditions, which vary depending on the nature of the fundamental right, the rule of law concerned and social policy.

Should the fundamental right be deemed applicable, its content may require interpretation, a process that entails adjustment of a generalized, abstract norm to the particular circumstances of Namibia. Finally, no rights are absolute. Most of the rights and all of the freedoms listed in ch 3 of the Constitution may in certain circumstances be limited by the social conditions and cultural traditions prevailing in the country.

II RECOGNITION AND APPLICATION OF CUSTOMARY LAW

(1) *Application of customary law*

Prior to any litigation about the constitutional validity of customary law, the court must decide whether customary law is applicable. In order to make this decision, reference will be necessary to the conflict of personal laws, a discipline providing choice of law rules that describe when systems of customary law apply to the facts of any given case.

For many years, s 9(1) of the Native Administration Proclamation¹ was the only statutory provision regulating application of customary law. This section was repealed in 1985² and it has not been replaced. On independence, art 66(1) of the Constitution declared that:

'Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.'

This provision was concerned primarily to confirm the validity of customary law at the date of Independence and to determine its relationship with the Constitution and prevailing legislation. From the absence of more specific regulation, it follows that the position of customary law in Namibia's legal system is only implicitly recognized.

Proclamation R348 of 1967, which gave courts of traditional leaders civil and criminal jurisdiction 'to hear and settle, subject to customary or statutory law, disputes over any customary matter between members of that traditional community',³ is the only other legislation relevant to choice of law. Namibia thus has no clear rules determining when customary law should be applied.

Application of customary law must therefore be governed by the general principles of the conflict of laws. Previously, courts were guided by the personal inclinations of the parties: individuals were free to use common-law institutions, such as commercial contracts, civil/Christian marriages and wills,⁴ and, if no common intention to abide by common law could be discovered, customary law was applied on the ground that those who adhered to an African culture were subject to its provisions.

ISSUE FOR DISCUSSION: Should clear choice of law rules be promulgated to assist the courts in deciding when to apply customary law?

¹ 15 of 1928.

² By s 5 of Act 27 of 1985.

³ A provision confirmed by s 10(3)(b) of the Traditional Authorities Act 17 of 1995.

⁴ In constitutional terms, this approach is consonant with a right to culture as framed in art 19.

(2) Proof and ascertainment of customary law

Namibian courts are prepared to take judicial notice of customary law. Yet, because the validity of this law is based on social practice, a documented version of the rules may be questioned on the ground that it no longer reflects current practices.

For purposes of proof, customary law must be treated as if it were the same as common-law custom, and in order to prove custom witnesses have to be called to establish whether a rule was certain, reasonable and uniformly observed for a period of time.

ISSUES FOR DISCUSSION:

What is the best method of proving customary law:

- 1. calling witnesses in each case in which a rule is contested?***
- 2. attaching assessors to the court?***
- 3. restating or codifying each system of customary law?***

IV APPLICATION OF THE FUNDAMENTAL RIGHTS

On the face of it, the Constitution suggests a loose ranking of rights, whereby any right to culture/customary law would consistently have to give way to the other fundamental rights.¹⁰ Article 19 provides that the right to culture shall 'not impinge upon the rights of others', and art 66(1) provides that customary law 'shall remain valid to the extent to which [it] ... does not conflict with this Constitution'.

If the entire catalogue of fundamental rights were to prevail over customary law, the consequence would be an end Namibia's indigenous legal systems - which is surely not the result wanted by the Namibian people, especially those who live their lives according to customary law. Accordingly, it is suggested that conflicts between customary law and the other rights contained in ch 3 of the Constitution be dealt with in 'a balanced fashion, giving each right its due'.¹¹

The process of balancing interests finds formal expression in the three inquiries most commonly encountered in the application of constitutional rights: application of fundamental rights in the private sphere (the question of 'horizontal'), interpretation and limitation.

(1) *Horizontal: application of human rights in the private sphere*

Article 5 of the Constitution, which governs application of the fundamental rights, provides that:

'The fundamental rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.'

This provision contains a significant caveat: the fundamental rights must be upheld by all natural and legal persons but only 'where applicable to them'.

Traditionally, all human rights were supposed to operate 'vertically' to regulate relationships between citizens and the state. Only in the last half of the twentieth century, depending on the nature of the right concerned and social policy, were constitutional norms applied 'horizontally'.

If a local culture is to preserve its autonomy and identity, then the scope of application the fundamental rights must be restricted. It seems sensible in the circumstances to follow thinking abroad where application of human rights is by and large confined to actions in which the state is party. At the same time, however, no state can afford to abdicate its responsibility to protect its citizens and to improve their lot

¹⁰By contrast, the constitutions of other southern African states were careful to shield customary law from norms of equality/non-discrimination.

¹¹*S v Van den Berg* 1995 (4) BCLR 479 (Nm) at 495.

in life. Hence, the American Supreme Court allows horizontal application after balancing the constitutional norms against the social and legal circumstances in which they will be enforced.

The German doctrine of *mittelbare Drittwirkung* offers a useful guide as to what *legal* circumstances are relevant to application of constitutional rights. Where rules of private law are general and abstract in their formulation, where private law has no applicable rule or where its rules are vague and contradictory, fundamental rights may be applied. Given the debatable authenticity of many of the rules of customary law, this doctrine could provide a useful framework for interpreting art 5 of the Namibian Constitution.

(2) *Interpretation of human rights*

If a fundamental right is held to be applicable, its content may well require interpretation. Human rights lay down only minimum standards of behaviour in abstract norms that are stated in the broadest possible terms. Each act of application therefore requires an adjustment of a to the particular circumstances of Namibia.

(3) *The limitation clause*

All rights are susceptible to the limitations imposed by the reasonable expectations of society. Article 22 of the Constitution provides a formal guide to the limitation of rights contained in ch 3:

'Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this chapter is authorised, any law providing for such limitation shall:

(a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;

(b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.'

Article 22 clearly contemplates only limitation by legislation. Hence, as far as customary law is concerned, courts may refer to criteria outside the article.

All law is presumed to comply with the Constitution. An onus rests on whoever alleges the invalidity of a rule to prove both factual and legal contravention of a fundamental right. Once an infringement has been established, the onus then shifts to the party seeking to uphold the offending law to prove that the fundamental right may justifiably be limited. The common denominators in this inquiry are a proportionality test and a balancing of interests: how reasonable is an offending rule in terms of the social conditions, experiences and perceptions of the people of Namibia?¹²

¹²*Ex parte A-G of Namibia: in re corporal punishment by Organs of State* 1991 (3) SA 76 (NmSC) at 96.

Courts must therefore weigh the merits of African culture against typically western values. They should bear in mind that family law - a particular target of ch 3 of the Constitution - is notoriously resistant to outside interference. Social reforms, especially those designed to emancipate women from the bonds of patriarchy, have failed to take effect where intended beneficiaries had no 'access to independent means of subsistence after acquiring their freedom'. Moreover, where individuals were unable to litigate in state courts, newly won rights and freedoms cannot be enforced.

Legislation can only be reliably applied by authorities under direct state supervision. In areas where the influence of the state is weak, parallel informal institutions will continue to flourish. Such legal pluralism suggests that the gradual introduction of fundamental rights is more likely to win long-term acceptance than a legal revolution decreed by the central state. A thorough appreciation of the social settings in which rules are supposed to apply is essential: to ignore context is to run the risk of the Constitution becoming paper law.

ISSUES:

Namibia has incurred obligations under the Convention on the Elimination of all Forms of Discrimination Against Women and the UN Convention on the Rights of the Child.

- 1. Can the rights contained in these Conventions be invoked by individuals in private litigation?***
- 2. Is the government obliged to implement the Conventions by legislation?***

V TRADITIONAL AUTHORITIES

(1) *Legislative functions*

Article 44 of the Constitution vests 'the legislative power of Namibia ... in the National Assembly'. Parliament nevertheless has power to delegate its legislative functions to regional councils and local authorities,¹³ and, by introducing traditional authorities as agents of government under the Traditional Authorities Act,¹⁴ it has implicitly delegated certain powers to traditional leaders too.

The Act speaks only, however, of the traditional leaders' power to 'ascertain the customary law applicable ... and assist in its codification'.¹⁵ None the less, a right to maintain cultural institutions is implied in the right to culture contained in art 19, and, because customary law cannot exist without being maintained and developed, it is arguable that a traditional ruler's customary power to make law is not superseded by art 44 of the Constitution. It would also seem that the essential content of the principle of democratic election is least infringed at the tertiary level of local government (the position allotted to traditional authorities), since law-making, especially in matters of custom, is not one of the principal functions of traditional leadership.

The question whether fundamental rights are applicable to the office of a traditional ruler can be answered affirmatively, for issues concerning political office have implications not only for the interests of private individuals but also society at large. This being the case, several conflicts are likely to occur between customary law and the Constitution.

First, in accordance with general democratic principles, art 17(2) allows every citizen over the age of 18 to vote and those over 21 to run for public office.¹⁶ By contrast, customary law would restrict office to members of 'traditional communities', a rule that also runs counter to the right of all citizens to participate in the culture of their choice.¹⁷ None of the constitutional rights, however, is absolute. In order to preserve its identity, a cultural group may legitimately limit admission of members and restrict participation in organs of self-government to its own members.¹⁸

Secondly, office is confined to members of ethnic groups, a rule that contradicts the prohibition on discrimination on the ground of ethnic origin. Again, the limitation clause (art 22) could be invoked on the ground that the Traditional Authorities Act does not negate the essential content of the norm of democracy: if an alternative,

¹³ See arts 108 and 111, respectively, of the Constitution.

¹⁴ 17 of 1995.

¹⁵ Section 10(1)(a).

¹⁶ Parliament may, however, override these rights 'on such grounds of public interest ... as are necessary in a democratic society'.

¹⁷ Which implies that they can insist on admission to any 'traditional community' and hence voting rights.

¹⁸ See the *Lovelace* case Report of the Human Rights Committee, GAOR 36th Sess, Supp No 40 (A/36/40) Annex XVII 166; (1985) 68 ILR 17.

democratic structure of government exists - which it does in the form of regional councils and local authorities¹⁹ - the continuance of non-democratic authorities would be permissible.²⁰

Thirdly, art 10(2) of the Constitution prohibits discrimination 'on the grounds of sex, race, colour, ethnic origin ... or social ... status'. Most offices in African political systems are hereditary according to a rule of primogeniture in the agnatic line, however,²¹ and the Traditional Authorities Act²² does not disturb customary law. The only argument for limiting the prohibition on gender discrimination is to say that inheritance of political office would not be the only aspect of status affected: any alteration to the customary rules of succession would entail a revolution in female status. The customary system is predicated on transmission of all the deceased's responsibilities and assets to an heir, in particular the duty to support the deceased's dependants. Should women be allowed to succeed, they would be required to play the same roles as men, which would mean equipping them with all the rights and powers that enable men to support families.

(2) *Executive powers*

In keeping with his position as head of the nation, a traditional ruler had plenary executive powers.²³ The major customary-law limitation on these powers was a duty to consult with councils before taking any important decision. Aside from revolt or secession, there were no formal methods of bringing capricious or corrupt leaders to book.

While customary executive powers (although cast in terms of obligations) are confirmed by the Traditional Authorities Act, s 11 brings them into line with constitutional norms.

(a) *[A]ny custom, tradition, practice or usage which is discriminatory or which detracts from or violates the rights of any person as guaranteed by the Constitution or any other statutory law, or which prejudices the national interest, shall cease to apply;*

(b) *any customary law which is inconsistent with the provisions of the Constitution or any other statutory law, shall be invalid to the extent of inconsistency.'*

¹⁹ Established under Acts 22 and 23 of 1992, respectively.

²⁰ What is more, s 12 of the Traditional Authorities Act provides that, in the event of a conflict between democratic and traditional government structures, the powers of the former are to prevail.

²¹ There could be no objection to the principle of *primogeniture* under the Constitution. Hence, if a traditional leader were to die leaving both male and female descendants, only the rule preferring male descendants would constitute discrimination.

²² 17 of 1995. Qualifications for holding office, removal and succession are regulated by customary law.

²³ A ruler's power to control land use within his domain and to allot land to individuals and on occasion remove them is dealt with below.

In consequence, decision-making is to be regulated by constitutional norms of administrative justice.²⁴ In this regard, art 18 provides that any person may demand that officials act 'fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation'.

Traditionally, rulers could order their subjects to work on their lands and provide labour for public works. Although art 9(2) of the Constitution prohibits forced labour, the customary obligation might not constitute a contravention if it is read in light of art 9(3)(e), which permits 'any labour reasonably required as part of reasonable and normal communal or other civic obligations'.

(3) *Judicial powers*

By virtue of their office, all traditional rulers had the power to adjudicate any disputes brought before them. Section 10(3)(b) of the Traditional Authorities Act confirms this power by providing that traditional authorities may 'hear and settle, subject to customary or statutory law, disputes over any customary matter between members of that traditional community'.

Jurisdiction is confined to the applicability of customary law and the affiliation of litigants to a 'traditional community'. Nevertheless, conflict with the constitutional prohibition on racial/ethnic discrimination is not completely circumvented, for s 10(3)(b) could be argued to be an *indirect* method of discriminating on the ground of ethnic origin. Even so, restricting the use of institutions peculiar to a culture to members of that cultural group it does not necessarily involve actionable discrimination,²⁵ because Africans are given tribunals that will be sympathetic to their cultural expectations.

A litigant may still argue that being forced to submit to the jurisdiction of a traditional court would entail being subject to a lower standard of justice - and therefore discrimination on the ground of ethnic origin or economic status.²⁶ In its ideal form, the indigenous system of adjudication probably offered a better guarantee of 'a fair and public hearing' than a western court; but two conflicts with the fundamental rights are possible.

Article 12(1)(d) of the Constitution provides that accused persons are to be presumed innocent until proven guilty. It often used to be said that customary law presumed the guilt of anyone charged with committing an offence and that the accused then had to convince the court otherwise. Use of a common-law concept to describe the customary judicial process is, however, misleading. The term 'assumption' is more apt to denote an indigenous tribunal's attitude, since absolute presumptions of guilt or innocence would make no sense where the principal aim of a trial was to mediate or reconcile.

²⁴ Again, horizontal application of the fundamental rights is not an issue in this respect, because traditional rulers act as agents of the state.

²⁵ See the Australian case *Gerhardy v Brown* (1985) 159 CLR 70.

²⁶ This argument would be especially pertinent to situations where a litigant has no choice of forum.

Subarticle 12(1)(e) of the Constitution entitles an individual to be defended by a legal practitioner, a right that cuts across customary notions of due process. Traditional courts had no institutionalized practice of professional representation. All adult males were expected to know the law and the judicial procedures of their people; only women or juniors needed assistance to present their cases. The principal reason for engaging legal professionals is to benefit from their advice on how to pursue rights in a complex, and for the litigant inaccessible legal system. Hence, a policy of excluding lawyers from the traditional courts seems reasonable where civil claims and minor criminal offences are concerned, because we can assume that litigants are familiar with their own, more informal system. In matters with more serious financial consequences, however, the exclusion of lawyers is less easy to defend.

Under Proclamation R348 of 1967, traditional courts were not permitted to impose any of the following punishments: death, mutilation, grievous bodily harm, imprisonment, a fine in excess of R40,²⁷ or, except for unmarried males below the age of 30 years, corporal punishment. With one exception - the whippings that may be inflicted on juniors - these statutory limitations are in line with art 8(2)(b) of the Constitution, which prohibits 'cruel, inhuman or degrading treatment or punishment'. Whippings have generally been considered contrary to human rights norms, both in Namibia²⁸ and elsewhere in southern Africa.

ISSUES FOR DISCUSSION:

- 1. Should the mandate to develop customary law in terms of the Constitution vest in traditional leaders or the government?**
- 2. Should traditional leaders retain legislative powers?**
- 3. When deciding who is entitled to become a traditional leader, should democratic principles of election override customary-law rules of succession?**
- 4. Do 'traditional communities' include people living in towns and cities?**
- 5. In what ways should traditional methods of adjudication conform to the Constitution?**
- 6. Should traditional leaders be given specific powers to enforce their judgments?**

²⁷ Or two head of large stock or ten head of small stock.

²⁸ *Ex parte A-G of Namibia, in re corporal punishment by Organs of State* 1991 (3) SA 76 (NmSC). Cf *S v Sipula* 30 March 1994 (unreported decision No 39/94).

VI WOMEN

The status of women in most parts of Africa is dictated by a deeply entrenched tradition of patriarchy. Male authority entails the disempowerment of women, who are generally deprived of control over property, capacity to contract and sue or be sued in court.

(1) *Control of property*

Throughout Africa, although women have always played a vital part in food-production, they were usually denied access to control over the *means* of producing food: land and livestock. Similarly, while control of the all-important consumer goods associated with modern economies normally goes to the person who acquired them, the tendency again is for men to be deemed owners.

Article 16(1) of the Constitution gives all persons 'the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees'. It seems, however, that subart (1) is opposable against the state only, for subart (2) deals with expropriation and due process. If this provision is only vertically applicable, it cannot be invoked by women against their husbands and guardians in support of a power to acquire property.

The better approach would be to rely exclusively on art 10, since the wording and the nature of the rights stipulated here do not exclude horizontal application. To the contrary, any vagueness or uncertainty in customary law is reason in itself for extending constitutional norms to private relationships. Further support for applying the equality clause can be found in Namibia's obligations under the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).²⁹

(2) *Contractual capacity and locus standi*

A logical corollary of removing control of property from certain classes of people is a rule depriving them of contractual capacity. Although there is no Namibian data available on this principle, it would be true to the logic of customary law if women were denied the power to contract.

Coupled with deprivation of proprietary and contractual capacities is denial of locus standi in judicio, on the assumption that women are not versed in the forensic arts and accordingly need someone to argue their cases for them. It follows that the rule is procedural in nature and must be distinguished from the substance of a claim. If a woman has no right of action, as, for example, where damages are sought for her seduction or where guardianship of her children is claimed, her guardian has the substantive right to bring the suit.

²⁹ Articles 15(2) and 16(1)(h), together with a purposive interpretation of art 10 of the Constitution.

Superficially, art 12 of the Constitution appears to afford women locus standi. It provides that 'all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal', but the term 'entitled' is not the same as a power, namely, a capacity to pursue an action without assistance. 'Entitle' implies a correlative duty on the part of the state to make its tribunals accessible to any person wishing to prosecute a legal claim, and at present customary law does not prevent women from appearing in court, provided they comply with the procedural requirement of due assistance.

Thus any improvement to the locus standi of women will have to be sought under art 10(1) of the Constitution, which affords every person equality before the law, or art 10(2), which prohibits discrimination.

Whether women should now be accorded the same capacities as men will depend upon whether constitutional norms are to be applied in domestic relations. As far as the courts themselves are concerned, they are obviously bound as organs of state to uphold the Constitution, but it is not clear whether a woman could invoke art 10 in a dispute with her husband or guardian.

All issues of capacity could be cured by a ruling that the Age of Majority Act³⁰ applies to persons subject to customary law. Because majority status empowers generally, women over the age of 21 would automatically be able to acquire and dispose of property, enter contracts, sue in court and act as emancipated adults on a par with men.

ISSUES FOR DISCUSSION:

- 1. Is it true that customary law denies women the power to acquire, control and dispose of property (especially property held jointly as part of a marital estate)?**
- 2. Can women go out to work without their guardians' consent?**
- 3. Should women acquire full legal capacity at an age to be determined by the Age of Majority Act?**

VII CHILDREN

(1) *Customary law, international law and the Constitution*

Most of the customary-law rules concerning children seek to determine the family to which a child should be affiliated. The child's welfare is of relatively little importance. All juniors fall under the charge of the head of the household; they have no legal capacities and, in any dealing with the outside world, they must be represented by the familyhead.

Under international law, however, a child's interests are of paramount importance.³¹ The effect of this rule is to favour a child above its parents or family and to purge parental power of any element of repression. In order to protect children from their parents and families, the state is given authority to intervene in the family domain, for children are clearly incapable of acting on their own rights.³²

Article 15 of the Constitution deals specifically with children's rights. It provides that:

(1) Children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interests of children, as far as possible the right to known and be cared for by their parents.

(2) Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development. For the purposes of this Sub-Article children shall be persons under the age of sixteen (16) years.

(3) No children under the age of fourteen (14) years shall be employed to work in any factory or mine, save under conditions and circumstances regulated by Act of Parliament. Nothing in this Sub-Article shall be construed as derogating from in any way from Sub-Article (2) hereof.

(4) Any arrangement or scheme employed on any farm or other undertaking, the object or effect of which is to compel the minor children of an employee to work for or in the interest of the employer of such employee, shall for the purposes of Article 9 hereof be deemed to constitute an arrangement or scheme to compel the performance of forced labour.³³

Unfortunately, art 15 does not incorporate the international norms favouring a child's interests or prohibiting discrimination on the ground of age. None the less,

³¹ Article 3(1) of the UN Convention on the Rights of the Child.

³² As the agent ultimately responsible for the welfare of all persons under its jurisdiction, the state has become upper guardian of all minors.

³³ Article 15(5) deals with detention of children under the age of 16.

Namibia has signed the UN Convention on the Rights of the Child which has significant implications for implementing constitutional rights.

A key question regarding art 15 is whether the rights it lists are applicable in private relationships. Certain rights, such as those contained subart (1), are by their nature opposable only against the state. Others, such as the prohibition on employment of children in factories, mines and farms, are clearly applicable in the private sphere. In the case of rights contained in subart (2), however, the question of horizontality remains open.

Where children are concerned, any doubts about extending constitutional norms into private relationships may usually be resolved in favour of horizontality. In the first place, as a party to the UN Convention on the Rights of the Child, Namibia is bound to modify its municipal law in accordance with its international obligations.³⁴ In the second place, for purposes of common law at least, the child's best interests principle is already enforceable as a matter of public policy.

(2) *The implications of fundamental rights for customary law*

(a) *The concept of a child*

Childhood is a flexible social category that is defined according to socio-economic circumstances and cultural stereotypes of ageing. Where, as with customary law, childhood does not end at a fixed age, a child's status can be manipulated by its guardian in order to deny the rights and powers that come with majority.

Article 15 of the Constitution sets no general age to determine childhood.³⁵ While art 1 of the UN Convention deems a 'child' to be any person under the age of 18 years, the Convention does not oblige states to enact laws specifying an age of majority. Hence there is no basis for introducing a definite age limit on childhood in Namibian municipal law. The problem could be remedied, however, by applying the Age of Majority Act³⁶ to persons subject to customary law.

(b) *Control of property*

Under customary law, persons who are not independent heads of households generally have few means of acquiring property and little control over it. Where families had to be self-sufficient subsistence units, the rural economies of sub-Saharan Africa required the labour and earnings of all family members to be pooled for mutual benefit. Estates were managed by the head of the household, who was obliged to distribute assets to meet the needs of everyone under his care. Thus whatever property a child obtained, unless it was specifically dedicated to the child's needs, became part of a family estate.

³⁴ Under art 144 of the Constitution. The best interests principle is also contained in arts 5(b) and 16(1)(d) of CEDAW.

³⁵ Specific age limits are fixed for the enjoyment of certain rights: 16 for subarts (2) and (5) and 14 for subart (3).

³⁶ 57 of 1972.

This system can work to the prejudice of individual children. Once junior men engage in wage labour, they gain economic autonomy relative to their seniors, and in such circumstances proprietary incapacity could amount to exploitation of child labour - which is prohibited both by art 15(2) of the Constitution and international law.³⁷

Certain constitutional rights could be invoked to rectify potential inequities. The relevant provisions would be art 10 (which requires equality before the law) and art 16(1) (which allows every person the right to acquire and hold rights in property). While art 16(1) can probably be discounted, because it seems to be only vertically applicable, a strong argument could be made for applying art 10 to parent-child relationships. The paucity of data on customary law and the uncertainty concerning applicability of the Age of Majority Act has created a situation that can only be remedied by reference to the fundamental rights.

Nevertheless, two difficult arguments must be met. First, to deny children control of property does not necessarily discriminate, because children are not always prejudiced. The common law - which also denies minors full proprietary capacity - is not deemed to violate fundamental rights. Secondly, proprietary rights are not a developed part of customary law, which lays greater emphasis on personal rights to support. Thus customary law secured the welfare of children by obliging heads of households to administer property under their control in the interests of their dependants. To contend that a child's *personal* rights are inferior to *real* rights pushes the notion of equal treatment under art 10 of the Constitution too far.

A more helpful line of inquiry would be to rely upon the UN Convention on the Rights of the Child and to consider whether customary law serves the child's best interests. If customary law works to the disadvantage of children, the answer is not necessarily to give them real rights. Instead, a child's interests may be better catered for by closer regulation of the administration of family estates.

(c) Contractual capacity and locus standi

A child's lack of proprietary capacity is normally complemented by a corresponding lack of contractual capacity and locus standi. Neither incapacity has occasioned much comment, probably because they do not prejudice children to the same extent that deprivation of proprietary capacity can. If this is the case, then to deny children the capacity to enter contracts or to sue in court does not constitute unequal treatment, because it evidently operates only to protect children from the consequences of their acts.

Nevertheless, children may be disadvantaged if they are incapacitated beyond a reasonable period of time. This is another situation where it would be expedient to impose a fixed age for terminating childhood.

(d) Custody and guardianship

In patrilineal societies, provided bridewealth obligations have been complied with, the husband and his family have full parental rights to any children born to a wife during

³⁷ Article 32 of the UN Convention.

marriage. In matrilineal societies, the mother's family (especially her brother) has a preferred right to the children.

Article 3(1) of the UN Convention is authority for introducing the principle of the child's best interests to cover all aspects of custody and guardianship, a proposal the courts would doubtless accept, for it is already in line with public policy.

(e) Discipline and initiation

African thinking on parental power tends to be conditioned by a belief that children were wayward and irresponsible and hence in need of discipline. Western thinking - which stresses the vulnerability of children and their right to self-determination - interprets parental powers restrictively in favour of children. In consequence, a child's best interests are always the overriding consideration and a child who is mature enough may decide its own future.

What customary law might deem reasonable chastisement might well be considered child abuse in the common law. It is difficult to know whether relevant provisions of the Constitution endorse the common-law or the customary view, because the terms used are so broad.³⁸ Support for the former comes from the UN Convention, which requires overriding emphasis to be placed on the child's best interests. Besides, whenever exercise of disciplinary powers amounts to an infraction of the criminal law, customary law must give way.³⁹ In the case of rites of initiation, for instance, a group or individual purporting to exercise its collective rights to culture would not be entitled to coerce someone into suffering bodily harm against his or her will.⁴⁰

(f) Legitimacy

Systems of African customary law are generally said to be an exception to the rule that offspring of illicit sexual liaisons are stigmatized as illegitimate (and thus penalized by being denied rights to succession and maintenance). In patrilineal societies, however, payment of bridewealth determines the position of children in their father's family as 'legitimate' offspring. Even so, whether legitimate or illegitimate, children suffer few disadvantages under customary law. Only boys may be penalized, and then only to the extent that they are not allowed to inherit if their father or guardian has legitimate male descendants.

Article 10 of the Constitution would be relevant to incorporating into Namibian law international norms banning the stigma of illegitimacy. Although subart (2) does not specifically prohibit discrimination on the ground of birth, it mentions discrimination on the ground of 'social status'. The only obstacle to applying art 10 is the question whether it can be applied in the domestic sphere. If we take into account the

³⁸ Article 8(1) provides that 'The dignity of all persons shall be inviolable' (which seems to support the child's self-determination) and subart (2) provides that 'no persons shall be subject to ... cruel, inhuman or degrading treatment or punishment' (which seems to support limitation on disciplinary powers).

³⁹ An argument could be constructed in terms of freedoms and rights: namely, that parents have a freedom to raise their children in any manner they see fit, but the freedom must give way to individual rights.

⁴⁰ *Thomas v Norris* [1992] 2 CNLR 139 (BCSC).

need to read art 10 in conjunction with the child's best interests, a cogent argument could be made in favour of horizontality.

ISSUES FOR DISCUSSION:

- 1. Does the concept of illegitimacy exist in customary law? If so, what are its implications and should it be retained?**
- 2. Should there be a uniform code of rules regulating the rights of children?**
- 3. Should all children acquire full legal capacity when they turn 21?**
- 4. Should a child's rights or its family's be deemed paramount?**
- 5. What rights and powers should children have over property?**
- 6. What should the age of majority be? Should it be 18 (as stated by the UN Convention) or 21 (as in common law)?**
- 7. Should a child's best interests determine who is entitled to custody and guardianship? What role should bridewealth play?**

VIII MARRIAGE

(1) *Recognition of customary marriage*

A husband's right to contract polygynous unions and his duty to pay bridewealth were reasons why the colonial state denied African marriages recognition and subordinated them to civil/Christian unions. To continue to refuse recognition, however, is in conflict with art 19 of the Constitution and may be tantamount to discrimination on the ground of ethnic origin. Implicit in the right of all Namibians to participate in the culture of their choice is a duty on the state to afford equal recognition to such cultural institutions as marriage.

(2) *Formation of marriage*

(a) *The right/freedom to marry*

A fundamental right/freedom to marry is provided in art 14(1) of the Constitution:

'Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family.'

(b) *Consent of the spouses*

Under art 14(2) of the Constitution a marriage may be contracted 'only with the free and full consent of the intending spouses'. Spousal consent is also an established rule of international human rights law⁴¹ and southern African courts have always held that, if customary law allowed forced marriages, it should not be applied on the ground of public policy.

(c) *Parental consent*

A family's power to arrange the marriages of children is synonymous with the African cultural tradition. Article 14(1) of the Constitution, however, provides that men and women of full age 'without any limitation due to ... ethnic origin ... social or economic status shall have the right to marry ...'. This article should obviously be applicable in private relationships, for not only is freedom to marry an accepted rule of international law,⁴² but it is also a long-established feature of public policy.

Freedom to marry is nevertheless restricted to persons who are old enough to understand the consequences of their act. The problem in this regard is that customary law does not prescribe a fixed age of competence. A straightforward solution to this (and other similar problems) would be to apply the Age of Majority Act to persons subject to customary law.

⁴¹ Sec art 16(1)(b) of CEDAW.

⁴² Sec art 16(1)(a) and (b) of CEDAW.

(d) **Formalities**

While registration is essential for civil and Christian marriages,⁴³ no formalities are necessary for customary unions. Implicit in the freedom to marry is the spouses' right to have the status of their union made certain. CEDAW requires registration of all marriages,⁴⁴ but it is arguably too stringent, for whether a marriage is determined by registration or some other means can hardly be said to impinge on fundamental human rights.

(e) **Bridewealth**

Bridewealth (a valuable consideration paid by the groom or his family to the bride's family in order to acquire rights over the woman and her progeny) is not a major feature of all systems of customary law in Namibia. In matrilineal societies, for instance, only a token amount is payable. While the practice is said to conduce to the inferior status of women, it is difficult to see how bridewealth can constitute an actionable discrimination against women, because it does not directly entail less favourable treatment for wives than husbands - after all, men have to pay, not women.

An alternative argument would be *indirect* discrimination: although a practice may appear gender-blind, the way in which it has operated over time may have worked to the detriment of women. The inquiry accordingly shifts from a specific act of prejudice to the long-term effect of a practice upon women as a group. Again, the problem with this argument would be proving that payment of bridewealth was a condition precedent to the unfavourable treatment of wives, an extraordinarily complex task (especially in view of a substantial literature claiming that bridewealth functions to benefit women).

(3) **Spousal relations**

(a) **Polygyny**

A perennially controversial topic in Africa has been a husband's right to take more than one wife, for polygyny is said to degrade the status of women. Yet, as with bride-wealth, it would be difficult to prove that polygyny is a direct cause of female subordination, particularly when it is said to perform the valuable functions of absorbing women into domestic units and preventing the breakdown of marriage on grounds of adultery. Furthermore, only the first wife of a customary marriage may be compelled to submit to polygynous unions against her will, and even she can protect herself by insisting on a civil/Christian marriage.

None the less, because men have a right that women do not, the constitutional norm of non-discrimination might mean that this right should be abolished or that women should be allowed to take more than one husband. Polyandry does not have the sanction of any cultural tradition in Namibia, and to introduce it as the solution to ob-

⁴³ And under s 17 of the Native Administration Proclamation 15 of 1928 African men who intend to contract civil or Christian marriages are obliged to disclose to a marriage officer whether they have subsisting customary unions.

⁴⁴ Article 16(2).

jections against polygyny would be a whimsical response to the problem. As for the first issue, the depth of feeling about polygyny elsewhere suggests that an immediate ban would be difficult to enforce and hence inadvisable. Instead, the gradual process of obsolescence should be allowed to take its course.

(b) Personal relations

Patriarchy dictates that men should be heads of families, and, on that ground, they claim sole powers of decision-making. It is widely assumed that the popular conception of patriarchy is endorsed by customary law, but many issues now arising in marriage - notably, birth control and alienation of a family house - were never contemplated by the 'traditional' code of customary law and they have not been properly tested in court. In addition, social and economic roles now played by women have long since outgrown the restrictions implicit in current notions of patriarchy.

These considerations suggest that spousal relations need to be reassessed in order to give effect to social practice rather than a traditional ideal. If the balance in the husband-wife relationship is to be corrected, equal powers of decision-making, especially regarding spousal violence, the rearing of children and the purchase and alienation of family property, need urgent attention. Where customary law lacks the rules necessary to regulate inter-spousal relations, arts 10 and 14(1) of the Constitution provide goals towards which legal development should aspire.⁴⁵

(c) Property relations

Customary rules governing proprietary relations were conditioned by the subsistence economy of pre-capitalist Africa. In most marriages the husband had a broad discretion to manage the estate, except for items of personal property which belonged to the individual concerned. Through a combination of two factors wives can find themselves in serious straits if their marriages are dissolved: because of poorer economic opportunities wives acquire far less during marriage than their husbands and husbands are not obliged to maintain their wives once marriage ends.

The most glaring contradiction between customary law and fundamental rights is a woman's lack of control over property. Once this problem has been remedied (through application of art 10 of the Constitution), the work of the courts is done. With only a norm of non-discrimination to go on, they cannot be expected to solve the complex issue of matrimonial property relations and post-marital maintenance.

(d) Civil/Christian marriages

According to Roman-Dutch law, marriage was automatically in community of property and profit and loss and wives were subject to their husbands' marital power. By making a simple prenuptial declaration under s 17(6) of the Native Administration Proclamation,⁴⁶ Africans who concluded civil/Christian marriages could choose com-

⁴⁵The latter requires equal rights for men and women 'during marriage and at its dissolution' and it is supported by art 5(a) of CEDAW.

⁴⁶15 of 1928.

munity of property. The husband's marital power, however, was not affected,⁴⁷ and so, despite her enhanced property rights, the wife's status remained similar to that of a minor. This regime was changed by the Married Persons Equality Act,⁴⁸ which abolished marital power, thereby giving wives of civil/Christian marriages the contractual and other powers they would have lacked under common law.

(4) *Divorce*

On the premise that customary marriages are transacted privately by the families concerned, the courts may disclaim the authority to dissolve customary marriages. It could be argued, however, that they may no longer refuse to hear divorce suits, for art 12(1)(a) of the Constitution gives every person the right 'to a fair and public hearing by an independent, impartial and competent Court of Tribunal established by law' in order to determine 'civil rights and obligations'. The question of horizontality would be problematic here, because although art 12 is clearly opposable against the state, there are no reasons to suppose that it could be invoked against a private individual.

Both spouses are in principle free to terminate their marriages if and when they choose. Women are in reality at a disadvantage compared with men, however, for some grounds of divorce, such as witchcraft, barrenness and single acts of adultery, avail husbands rather than wives. The prohibition on discrimination under arts 10(2) and 14(1) of the Constitution⁴⁹ would be sufficient reason for the courts to exercise their discretion as much in favour of wives as husbands.

Customary procedures for obtaining divorce may also place the wife at a disadvantage, because, if a woman is deemed to lack *locus standi*, she must obtain her guardian's assistance to prosecute the action. But wives may now claim a substantive right to end their marriages under art 14(1), which guarantees equal treatment for women on dissolution of marriage. Any procedural incapacity can, where necessary, be cured by the appointment of a curator *ad litem*.

In theory, because marriage is an alliance of two families, not two individuals, guardianship of children goes to the family rather than the individual parent. Strictly speaking, therefore, a mother had no right to her children. On the basis of arts 10 and 14(1) of the Constitution, however, mothers now have a right to claim their offspring from husbands and/or customary-law guardians.

⁴⁷ Which can only be excluded by antenuptial contract.

⁴⁸ 1 of 1996.

⁴⁹ Coupled with art 16(1)(c) of CEDAW.

ISSUES FOR DISCUSSION:

1. *If spouses marry both under customary law and civil/Christian rites, which law should determine their rights and duties?*
2. *Should customary marriages be registered?*
3. *Should parental consent always be a requirement for a valid customary marriage?*
4. *If bridewealth is regularly given in a particular community, should it be regarded as necessary for a valid customary marriage?*
5. *Should polygyny be regulated, and, if so, how?*
6. *Should spouses have equal powers of decision-making regarding such key issues as the disposal of assets in the marital estate?*
7. *Should spouses be entitled to choose the system of matrimonial property by antenuptial contract?*
8. *What type of marital property regime should prevail if spouses do not expressly choose one?*
9. *Should all customary marriages require dissolution by a competent court?*
10. *Should payment of post-marriage maintenance be determined by common-law rules?*
11. *How should the marital estate be distributed on divorce?*

5) *Succession*

(a) *Inheritance by widows*

In customary law succession is intestate, universal and onerous. Thus an heir inherits not only a deceased's property but also his responsibilities, in particular the duty to support surviving family dependants.

Constitutional norms of equal treatment and non-discrimination, in particular arts 10 and 14(1), might be enough to overturn the customary bar on widows inheriting, for any rule that the deceased's heir be male would constitute prima facie discrimination against female descendants. The counterargument would be that widows have a personal right against heirs for maintenance out of the deceased estate,⁵⁰ because widows suffer no material prejudice, customary law might be considered a justifiable limitation on the Constitution.

ISSUES FOR DISCUSSION:

- 1. *Should all gender discrimination be removed from the customary rules of succession?***
- 2. *If so, who should be regarded as the beneficiaries of a deceased estate?***

(b) *Levirate unions*

Under certain systems of customary law, if a familyhead died and if his widow were still young and capable of bearing children, she would be expected to enter into a levirate union with one of the deceased's male relatives. Because these unions are obsolescent, they are unlikely to present problems under the Constitution; nevertheless, the principle of freedom of marriage guards against women being forced into such unions against their will.

⁵⁰ Even though this right is hedged round with implicit restrictions: the widow must reside at the deceased's homestead and she must continue to perform her wifely duties.

IX PROPERTY RIGHTS AND LAND

(1) *Ownership of the reserves*

The Namibian government has claimed to be owner of the country's communal lands, an assertion that rests on Schedule 5 of the Constitution⁵¹ and art 100.⁵² The former is not a reliable basis for the claim, however, for a Schedule cannot detract from the substance of rights guaranteed in the body of the Constitution (in this case, especially arts 16 and 10). Article 100 is located in the chapter on Principles of State Policy, and, because these principles are not legally enforceable,⁵³ the government has no *legal* basis for its claim.

The government's claim is valid only if communal lands are deemed to be not 'lawfully owned', and therefore not subject to the protection of art 16.⁵⁴ But to contend that such lands fall outside the scope of art 16 suggests discrimination, in that customary tenures are not protected on a par with common-law tenure. In the circumstances, it seems most likely that ownership of these lands vests in the communities themselves (a contention which presupposes existence of the doctrine of aboriginal title).

(2) *The problem of describing customary conceptions of property*

During the colonial period, systems of land tenure indigenous to Africa received scant respect. Because customary law had no distinct category of property law, it was considered inferior to western law. Part of the reason for this prejudice was an inability to translate customary tenure into terms comprehensible to colonial lawyers.

A particularly tenacious misconception is the idea that customary land tenure is communal, a fallacy deriving from the belief that African societies are organized on communistic principles. In strictly legal terms 'communal' is ambiguous. It can mean either that a right is held by a group of people jointly (by a single inseparable title) or by a group in common (each person having a separate but same title). Neither meaning reflects the actual tenure of residential sites and arable plots.

What makes 'communal' so objectionable is the implication that customary tenure is primitive. Because 'communal' tenure involved something less than the property rights of 'civilized' law, it justified expropriation of land held under custo-

⁵¹ 'All property of which the ownership or control immediately prior to the date of Independence' vested in the government of South West Africa 'shall vest in the Government of Namibia.'

⁵² 'Land, water and natural resources ... shall belong to the State if they are not otherwise lawfully owned.'

⁵³ Article 101.

⁵⁴ Besides, if the government of Namibia succeeded to the same rights and powers exercised by the South African regime, then its rights are confined by the trust that was established for the reserves.

mary law - a danger that still exists, for modern constitutional lawyers may well be tempted to dismiss 'communal' rights as less worthy of protection than full ownership.

(3) **Powers of traditional leaders**

(a) **Power of allotment**

Implicit in their role as leaders of the nation traditional rulers have the power to control land use and to allot portions to members of the community.⁵⁵ Although the Native Reserve Regulations of 1924⁵⁶ removed this power in certain parts of the country, the authority of traditional leaders has in practice not been usurped.

Married men with families to support may apply for land within the area of a chiefly authority. The successful applicant then distributes portions of the tract he was allotted to his wife and other dependants. Allottees acquire a right to use and exploit the land they are given.

Allotment of land may be governed by certain procedures, in particular a duty to consult elders or councillors. As official administrative acts, land allotments should in any event be subject to the rules of administrative law.

(b) **Power to regulate common resources**

Every member of a political unit has access to its common natural resources, in particular to pasture, but also to wood, reeds, clay and edible fruits and plants. Similarly, natural sources of water are available to all everyone. The freedom to use common resources is subject to a local ruler's power to regulate access if and when this becomes necessary in the interests of the community as a whole.

(c) **Power of removal**

Consonant with their power to punish offenders and control access to land for the good of the community, traditional authorities have a power to order landholders (and occasionally even whole communities) to relinquish the land they were allotted.

The reasons for issuing a removal order may be grouped into two categories. Under the first, the power is exercised for a general public purpose, which would include situations where land is needed for public works, the soil is exhausted or the holder has more land than necessary for subsistence. In all but the last case, dispossessed landholders would be given land elsewhere in the realm. Under the second category, the purpose is to penalize landholders who committed offences. A dispossessed holder may the right of avail altogether, a drastic punishment amounting to expulsion from the nation.

⁵⁵The head of a nation is seldom personally responsible for the day-to-day business of making allotments, however. Where the realm is structured into subordinate political units, this power is exercised by the next person in the hierarchy of authority: the wardhead (or headman).

⁵⁶Sections 9 and 11 of GN 68 of 1924, respectively. These powers were vested in superintendents (today magistrates).

The main objection to customary law is a lack of any clear legal restraints on the abuse of removal powers. A procedural check of sorts exists in the practice of consulting councillors and in the requirement that reasons must be given for decisions, but some systems of customary law do not allow a right of *audi alteram partem*. Arguably the traditional leaders' removal powers have been endorsed by the Traditional Authorities Act.⁵⁷ If this is the case, exercise of their powers will have to conform to the fundamental rights,⁵⁸ in particular art 18, the provision on administrative justice.

(4) Individual rights

(a) The right of avail

Anyone who is a member of one of the political subdivisions of a realm has a 'right of avail' to land within it. Access to land and the right of avail should be distinguished. Because the responsibility for establishing and maintaining a family usually falls to adult, married males, they are the persons who directly approach a wardhead to claim land. Family dependants have indirect claims - or access - through the heads of their households.

It would be in keeping with the patriarchal character of customary law that women have no right of avail. (As members of a family, of course, they have *access* to land via the familyhead, who in terms of his general duty of support would be obliged to allot wives plots of land on which to maintain themselves and their children.) Abundant evidence is available, however, to indicate that independent women are holding land on their own account.

The head of a household is generally allotted two types of land: a residential site, dedicated to housing the family and domestic gardening, and one or more plots of arable land for growing cereal crops and vegetables.

A right of avail does not necessarily give an individual the right to choose where to live or how much land to acquire; nor may landholders move existing homesteads to new locations within an area. Family subsistence is the guiding criterion, hence the amount of land that an individual obtains is determined by reference to the present and future needs of a family.

(b) Transfer of interests

(i) Death of the holder

Implicit in the concept of inheritance (ie transmission of a deceased person's property to his or her heirs) is an assumption that the deceased's rights were individual and inalienable. If landholders do not 'own' their land, in the sense that they may not alienate it to whomever they choose, then land cannot form part of a deceased estate. In theory at least, the holder's rights should expire on death so that the allotment becomes available for redistribution. In reality, however, a landholder's family usually remains on the land when he dies. This development may be a rule of certain systems of cu-

⁵⁷ Section 10(3)(d) of Act 17 of 1995.

⁵⁸ In terms of s 11(1) of the Act.

stomary law or simply be a practice (borne of land shortage) running contrary to established principle. Whether or not a shift in practice should be accorded normative weight is still undecided.

(ii) *Alienation*

In pre-colonial Africa, land was considered a God-given resource that could not be permanently appropriated by any one person. While landholders have always allowed neighbours or kinfolk in need to use their plots, they still needed the approval of their local ruler to effect a permanent transfer of rights.

An unfettered right to alienate residential and arable allotments cannot be allowed without upsetting the entire system of customary land tenure. Alienability presupposes an individual's freedom to use and dispose of property at will. Where landholders have both rights and duties, some owed to family members and some to the political authorities, an unrestricted freedom to dispose of property is not juridically feasible.

(5) *Customary interests and the Constitution*

Article 16 of the Constitution reflects a typically western attitude to property.

'(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

(2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.'

The most important question is whether the 'right to acquire, own and dispose of all forms of immovable and movable property' in subart (1) includes customary interests, especially an individual's right to residential sites and arable plots. Given the difficulty of expressing customary concepts and the bias in favour of common-law ownership,⁵⁹ such interests might well be regarded as too precarious to warrant constitutional protection.

Article 16 need not be interpreted in terms of the traditional common-law definition of proprietary rights, however. Jurisprudence abroad indicates that excludability, or the right to keep an object to oneself, is the major criterion in determining what rights deserve protection. What is more, the right to culture under art 19 and the norm of equal treatment under art 10 suggest that customary interests cannot be dismissed as irrelevant.

⁵⁹ Which includes the classic rights to use and enjoyment, the power to transfer rights and the liberties to consume or destroy.

Accepting that customary interests do fall within the ambit of art 16, the next question is whether the clause in subsection (1) - 'All persons shall have the right ... to acquire, own and dispose of all forms of immovable and movable property' - gives women a right of avail on a par with men.⁶⁰ When art 16 is read together with art 10 of the Constitution, the answer must be that women may not be discriminated against.

A more difficult question is whether art 16(1) permits landholders to dispose of their customary interests by sale, lease or will. While there would be no obstacle to applying a constitutional right in these circumstances - because traditional rulers are organs of state - two reasons can be advanced for allowing customary law to limit art 16.

In the first place, it would be in conflict with the right to culture in art 19 (and there would be no cause to restrict art 19 on grounds of 'the rights of others or the national interest').⁶¹ In the second place, were alienation to be recognized as a constitutional right, we have no indication who would be entitled to exercise the right. It would be arbitrary to allow a familyhead exclusive powers of alienation, when his wife, children and other dependants have concurrent interests in the land.

Article 16(2) allows the state to expropriate property, provided that it is done 'in the public interest subject to the payment of just compensation'. In this regard, a distinction must be drawn between the state's power to 'police' or control property and its power of eminent domain.⁶² Because the Constitution speaks only of expropriation, with the implication that police powers were not contemplated, the traditional authorities' analogous power to control use of resources is unaffected.⁶³ Their power to remove landholders is preserved in art 16(2), which states that 'a competent body or organ authorised by law' may expropriate.⁶⁴

One final matter should be noted. Land within areas ruled by traditional leaders has never been available to all and sundry; only people accepted as members of the polity have a right of avail. The customary rule is in conflict with both art 16(1) (which provides that 'all persons shall have the right in any part of Namibia to acquire ... all forms of immovable property') and art 21(1)(h) (which provides that 'all persons shall have the right to reside and settle in any part of Namibia').

⁶⁰No problem of horizontality arises here because claims would be asserted against the traditional leaders who are organs of state exercising public-law powers.

⁶¹To the contrary, the common weal of many communities might be seriously damaged if landholders were to trade their interests on the property market.

⁶²The former denotes regulation of the use of property in order to protect citizen from citizen, while the latter refers to the appropriation of private rights for broader public purposes. Holders whose rights are expropriated must always be compensated, but, because an exercise of police powers does not entail the extinction of individual property rights, compensation is not always payable.

⁶³Which is codified in s 10(2)(c) of the Traditional Authorities Act 17 of 1995.

⁶⁴And customary law would provide sufficient authorization. However, the requirement of just compensation would have to be fulfilled. Where a removal order is issued pursuant to commission of an offence, the matter is one of penal *confiscation* rather than expropriation, and so would fall outside the ambit of art 16(2).

Jurisprudence abroad,⁶⁵ however, has held, on the ground of affirmative action, that strangers may be validly excluded from areas reserved for aboriginal peoples.⁶⁶ On this reasoning, traditional authorities may restrict land to those persons who are already connected by birth or family to a polity, but the strong stance taken against racial discrimination in the Namibian Constitution would nevertheless suggest that race is not a permissible ground for exclusion.

The power of traditional leaders to determine where land is to be allotted also conflicts with art 21(1)(h). In this regard, however, customary law constitutes a legitimate limitation of the freedom, akin to common-law zoning regulations.

ISSUES FOR DISCUSSION:

- 1. Should traditional leaders be required to exercise their customary powers of allotment and land control in terms of the Constitution? In particular, should all forms of discrimination against women be removed?**
- 2. How should an individual's customary rights to land be protected?**
- 3. Should individual rights be registered?**
- 4. Should new practices such as fencing be recognized?**
- 5. Should people be entitled to inherit land?**
- 6. Should landholders be entitled to sell their interests?**

⁶⁵ See the Australian case of *Gerhardy v Brown* (1985) 159 CLR 70.

⁶⁶ A need to conserve resources would be another legitimate reason. See, for example, the *Lovelace Case* Report of the Human Rights Committee, GAOR 36th Sess, Supp No 40 (A/36/40) Annex XVII 166; (1985) 68 ILR 17.

THE RELATIONSHIP BETWEEN CUSTOMARY LAW AND THE CONSTITUTION

I INTRODUCTION

1 HUMAN RIGHTS AND THE AFRICAN CULTURAL TRADITION

A keystone of Namibia's Constitution¹ is a bill of rights. Given the long period of South African rule, when political, social and economic discrimination was the everyday experience of most Namibians, it is quite proper that all people in the nation should now benefit from a uniform standard of treatment. Indeed, through the Constitution runs 'one golden and unbroken thread - an abiding "revulsion" of racism and apartheid ... [n]o other Constitution in the world seeks to identify a legal ethos against apartheid with greater vigour and intensity'.²

Namibia has a markedly heterogeneous population, however, and this report explores an issue that might easily be overlooked in the desire to guarantee equal treatment: the freedom of groups and individuals observing cultural traditions to diverge from the national standard. If distinctive lifestyles and systems of personal law are to be given proper respect and recognition, conflicts with the fundamental rights enshrined in ch 3 of the Constitution are bound to arise.

Proponents of human rights often claim that such rights reflect a universal, and therefore a culturally neutral value system; but they forget the origin of modern bills of rights in Western Europe and North America. In this regard ch 3 of Namibia's Constitution is no exception: it was based on the typical western model, in particular by the 1948 Universal Declaration of Human Rights.³

¹Adopted by the Constituent Assembly on 9 February 1990.

²*S v Van Wyk* 1992 (1) SACR 147 (Nm) at 173.

³Naldi (1994) 6 *Afr J Int & Comp L* 48. While the accession of many developing nations to international declarations and conventions has tended to universalize human rights norms, compliance still depends on the high level of affluence associated with western nations: Asante (1969) 2 *Cornell Int LJ* 85.

African culture and customary law has been overshadowed by the prestige currently enjoyed by human rights.⁴ One of the reasons for this tendency was the way in which African culture had come to be identified with apartheid, for South African policy had been justified by an appeal to native traditions and local rulers.⁵ Besides, throughout Africa, because indigenous institutions are thought to preserve antiquated economies and encourage tribal factionalism, they have been considered obstacles to progress and nation-building.⁶ Hence, when Namibia obtained its independence, no serious attention was paid to the place of customary law in the country's future legal system,⁷ and traditional leaders - the guardians of the African cultural tradition - were excluded from the process of drafting a bill of rights.⁸

African and western visions of law and rights differ profoundly.⁹ African forms of government had nothing in common with the *Rechtsstaat* in the sense that legitimacy was not tested by a rule of law.¹⁰ While rulers were constrained by norms of good government that prohibited arbitrary or self-interested action, these norms bore no resemblance to western constitutions.¹¹ But, for African societies, rules per se had no particular value,¹² as social harmony could be achieved through other means.¹³

⁴When decolonization began in Africa, not only were the arbiters of law and development convinced that human rights were a superior value system, but they also believed an inexorable process of acculturation would eventually result in the westernization of all people: Roosens *Creating Ethnicity* 9.

⁵This is particularly evident in the 1962 Odendaal commission, which became the blueprint for dividing the Namibian people into separate 'native nations' under the Native Nations in South West Africa Act 54 of 1968.

⁶See generally Woodman (1993) No 14 August *Afr Soc Int & Comp L* 1. The 'unitary state' language in arts 1 and 63(2)(i) of the Constitution, for instance, was aimed partially at suppressing tribalism: Namibia Constituent Assembly Debates vol 11 21 November 1989 - 31 January 1990. See, too, recommendations in para 10.2.4 of the Kozonguizi Report *Commission of Inquiry into Matters relating to Chiefs, Headmen and Other Traditional or Tribal Leaders*: 'in Namibia the socio-economic arrangements determine that the country be developed as a unitary entity whilst the inter-tribal rivalries of pre-colonial days and exacerbated by the Colonial policy of divide and rule, can only be combatted by the promotion of a Namibian Nationhood represented by a strong Central Government with the necessary ... devolution of authority to regional and local administrations in a geographical context.'

⁷And no attempt was made to adjust a code of western norms to an African setting.

⁸Three South African lawyers, none with any particular expertise in customary law, dominated the drafting of the Constitution: Diescho *The Namibian Constitution in Perspective* 31.

⁹Pollis & Schwab *Human Rights: cultural and ideological perspectives* 13 note that: 'It is evident that in most states in the world, human rights as defined by the West are ... meaningless. Most states do not have a cultural heritage of individualism, and the doctrines of inalienable human rights have been neither disseminated nor assimilated.'

¹⁰African societies are, as Nguema (1990) 11 *Human Rights LJ* 269 puts it, 'suspicious of law, and they steer clear of courts and justice instituted by the State'. Cf Weber's threefold typology of legal orders - charismatic, traditional and legal/rational - in Rheinstein *Max Weber on Law in Economy and Society*.

¹¹Instead, they can be regarded as an undifferentiated repertoire of moral precepts, customs and adages.

¹²Unlike western societies: Bohannan *Law and Warfare* 44-6. The emphasis on rules and the normative order of society is a western value (which has incidentally pervaded much of the

Mediation and conciliation were essential processes for maintaining order,¹⁴ and so too was the healing force of ritual,¹⁵ belief in which involved the co-operation of watchful ancestral shades.¹⁶

Possibly an even more significant feature of African attitudes was a lack of interest in change (with the underlying assumption that change leads to progress) for its own sake. While change and progress are ultimate values in the western world, for ordinary Africans (if not for their leaders) tradition warranted at least equal respect. The functions of customary and western systems of law are therefore in sharp contrast: the former seeks to counteract behaviour calculated to disrupt the status quo and the latter facilitates a constant momentum of purposeful change.¹⁷

2 AFRICAN VALUES AND CULTURAL RELATIVISM

An absence of rules and an emphasis on tradition do not necessarily mean that the individual will suffer mistreatment or abuse. Several writers have shown that Africa has its own indigenous doctrine of rights¹⁸ that sometimes co-incides with western standards and sometimes exceeds them.¹⁹

If we accept that the ethical systems indigenous to Africa can and do sustain human dignity, we must ask whether the western instrumentality for achieving the same goal - formal legal rights - would be more effective. In other words, if human needs are already catered for, then a bill of rights would be redundant.²⁰ To answer this question, however, we must appreciate how differently the individual is conceived in Africa and in the West.

anthropology of law). See generally: Abel (1973) 8 *Law & Soc R* 221-32; Roberts *Order and Dispute* 17ff; Comaroff & Roberts *Rules and Processes* 5-17.

¹³Functionalist anthropology has played a critical role in demonstrating that societies with no evident concern for law and legality could none the less function peacefully and harmoniously. Techniques of social control were simply different.

¹⁴See: Bohannan *Justice and Judgment among the Tiv* 208-13; Holleman *Issues in African Law* 18; Roberts (n12) ch 8; Gulliver *Social Control in an African Society* 1-4.

¹⁵Gluckman *Politics, Law and Ritual in Tribal Society* ch 6.

¹⁶Who kept a constant (and generally benign) watch over the living to ensure that order was maintained and proper respect paid to tradition.

¹⁷The qualities of western systems are captured in Weber's epithet 'rational': Morris (1958) 107 *Univ Pennsylvania LR* 147.

¹⁸Nyerere *Freedom and Socialism: Uhuru na Ujamaa* 2, Kaunda *A Humanist in Africa* 24-5 and Diescho (n8) 3. See generally: Welch in Welch & Meltzer *Human Rights and Development in Africa* 14; M'Baye in Vasak *The International Dimensions of Human Rights* 589; Motala (1989) 12 *Hastings Int & Comp LR* 379ff; Eze *Human Rights in Africa* 10-14.

¹⁹For instance, in Africa the right to life was wider than the corresponding right in Europe: there was not only a general prohibition against killing but also an obligation to assist the needy: Nhlapo (1989) 3 *Int J Law & Family* 5 and 1991 *Acta Juridica* 140.

²⁰As Donnelly (1984) 6 *Human Rights Quarterly* 417, says: 'The easiest way to overcome the presumption of universality for a widely recognized human right is to demonstrate either that the anticipated violation is not standard in that society, that the value is (justifiably) not considered basic in that society, or that it is protected by an alternative mechanism.'

African society is usually perceived to be dependent for its cohesion on bonds of kinship.²¹ At the foundation of African socio-political structures lay the extended family, an accommodating group that provided for all an individual's material, social and emotional needs.²² Because the family was the focus of social concern, individual interests were inevitably submerged in the common weal²³ and the normative system tended to stress an individual's duties instead of his or her rights.²⁴

The position of children in the legal order demonstrates how insignificant personal rights were. Customary law had no specific rules or procedures to secure a child's upbringing. At a time when extra hands were always needed to till fields and herd livestock, any child was a welcome addition to a household, and, once accepted, it would be assured of food, shelter and support. Abundant land, shortage of labour, a subsistence economy and the highly developed sense of generosity due to all family members underwrote this liberal attitude to support.²⁵ Customary law was concerned less with protecting children than with deciding which family was entitled to claim a child as one of its members.²⁶ It did not follow from an absence of rights that children were systematically abused, neglected or treated like chattels. The benevolent ethic pervading the relationships of all kinfolk assured children of nurture and support.²⁷

The African apologist's argument that the indigenous social order assured human dignity in all material respects is therefore a plausible one. Yet, those who contend that human rights are irrelevant to Africa because the Continent has its own ways of securing human dignity all too often base their case on a conception of African society that is rooted in pre-colonial times. This society no longer exists.²⁸ The African social order, like any other, is dynamic. Change, rapid and disruptive, is clearly evident in domestic relationships. Informal unions have become commonplace; illegitimate births have proliferated; women have been forced to undertake the rearing of children alone; many modern households lack the stabilizing influence of a

²¹Gluckman *The Ideas in Barotse Jurisprudence* 4-5.

²²Needs that, in politically centralized societies, are taken over by the state, acting through its bureaucratic agencies of health, education and social welfare.

²³In contrast, according to western thinking, each person is regarded as an isolated, abstract entity, protected by rights opposable against the group: Donnelly (n20) 311. As Kiwanuka (1988) 82 *Am J Int L* 82 says, the human rights lawyer sees 'individuals as locked in a constant struggle against society for the redemption of their rights'.

²⁴Diescho (n8) 3 and Gluckman (n21) ch 8, especially 269; Donnelly (1982) 76 *Am Political Science Rev* 306; M'Baye in Vasak (n18) 588-9. To stand by rights would be thought anti-social. Instead, the individual would be expected to compromise his or her interests for the good of all. Thus the legal relationships of most consequence in customary law were those arising out of a family's dealings with other families, not those flowing from one person's relations with another.

²⁵Bennett 1980 *Acta Juridica* 117-18.

²⁶Because children were agents of the devolution of the family fortunes: Goode *The Family* 24.

²⁷Nhlapo 1991 *Acta Juridica* 144-5.

²⁸Donnelly (n20) 406.

patriarchal head.²⁹ Such family units are obviously incapable of providing the support network that traditionalists see as the foundation of African civilization.

Notwithstanding the shortcomings of the African social order, the international community is now more sympathetic to local culture, which worldwide has become a rallying point for threatened minorities. Peoples in eastern Europe, the Americas, Asia and the Pacific have been demanding greater respect for their cultures to counter the ubiquitous drift towards westernization and to justify political self-determination.³⁰ A philosophy of cultural relativism now poses a direct challenge to the human rights movement.

Namibia, a country of diverse cultures, is in no position to reject its indigenous cultural traditions. (The Constitution in fact supports a right to culture, although only in broad terms and without explicit reference to customary law.)³¹ While the prominence given to western institutions in the Constitution might suggest that African culture is to be swept aside whenever it is in conflict with the bill of rights, such a drastic reading would be neither legally necessary nor politically expedient. Some form of accommodation can be found between customary law and ch 3 of the Constitution.³²

It should be appreciated that, despite rhetorical claims that human rights are immutable, eternal standards, they are in fact adaptable. In the first place, human rights lay down only minimum standards of behaviour, and, because they are stated in the broadest possible terms, each act of application requires adjustment to local conditions. In the second place, no right is absolute: each must be limited by the exigencies of social life.³³ And, finally, contradictions between the rights themselves invite constant revision and adjustment.³⁴

Cultures too are amenable to compromise. Like bills of rights, they are constantly changing, both in reaction to extrinsic forces (such as human rights) and through the dynamics of internal conflict. Opinion on African tradition is no monolith of uniformity: even those who might reject what they see as a menacing western influence do not necessarily support all parts of their own heritage.

3 READING CUSTOMARY LAW WITH THE CONSTITUTION

This report seeks to identify conflicts between human rights norms and the rules of customary law, and in certain cases it attempts to resolve or reconcile those conflicts. Such an inquiry requires, at the outset, a determination whether customary law is

²⁹Two works exploring these issues are Murray *Families Divided* and Lye & Murray *Transformations on the Highveld*.

³⁰As a basis for self-valorization in a changing world, culture offers unique advantages: Roossens (n4) 14 and 16.

³¹Article 19.

³²In particular the prohibition against discrimination on grounds of sex or ethnic origin.

³³The usual example given concerns freedom of speech: a person is not free to engage in racially inflammatory 'hate speech' in a country recovering from the legacy of apartheid.

³⁴A notable instance is, of course, the contradiction between the right to equality in art 10 and the right to culture in art 19 of the Constitution.

applicable to legal proceedings. The conflict of personal laws, a discipline that provides choice of law rules to decide which law applies to the facts of any given case, governs this decision.

Secondly, if it is apparent that customary law does apply, the authenticity of the rule at issue must be checked. The validity of custom rests on its observance by the community in question. The customary law most readily available for use in litigation, however, will be a written source that documented the rules applicable in the jural community from which the law originated. This so-called 'official code', however, may not be realized in current social practice. Should this be the case, a more authentic version of the rule will have to be discovered.

Thirdly, a decision must be made whether the fundamental right in issue should be applied in private relationships. All human rights were traditionally supposed to operate 'vertically', to regulate relationships between citizens and the state. It is only in the last half of the twentieth century that 'horizontal' application of constitutional norms has been allowed, and then only under certain conditions, which vary depending on the nature of the fundamental right, the rule of law concerned and social policy.

Fourthly, if a fundamental right is held to be applicable, its content may well require interpretation, a process that entails adjustment of a generalized, abstract norm to the particular circumstances of Namibia. Finally, special provision is made in the Constitution for limitation of the rights listed in ch 3, an analysis that may overlap to some extent with the previous issues, for determining whether limitation is permissible includes reference to the social conditions and cultural traditions of the country.

II RECOGNITION AND APPLICATION OF CUSTOMARY LAW

1 HISTORY OF RECOGNITION AND APPLICATION OF CUSTOMARY LAW

(a) German colonization: 1884 to 1914

German rule in South-West Africa had minimal effect on indigenous systems of customary law,¹ because the resources of the colonial administration were too limited to permit full control of the country. Hence people in the northern areas, including the Caprivi strip,² were left to their own devices.³ Even in the southern region, the area that attracted the largest settler population, German officials applied customary law in civil cases concerning indigenous litigants.⁴ And, by special agreement, Germany allowed the Herero and various Nama groups to retain their own courts and legal systems.⁵

¹ See Olivier *Inboorlingbeleid en -administrasie in die Mandaatgebied Suidwes-Afrika* 149-53.

² Which was acquired in 1909. See Pretorius *The Fwe of the Eastern Caprivi Zipfel* 70.

³ Olivier (n1) 164-7.

⁴ See Meinhof 1908 *Journal of the African Society* 162 and Olivier (n1) 150.

⁵ Bley *South West Africa under German Rule 1894-1914* 140; Duggal *Toward a New Legal System for Independent Namibia* 3. According to Olivier (n1) 151, although indigenous political

The most prominent feature of German rule was a project to restate customary law.⁶ The scheme began in 1907 with the appointment of a commission, which requested all missionaries and district officers in German colonies to collect information on the basis of a questionnaire compiled by the German ethnographer, Joseph Kohler.⁷ All questionnaires were returned to Berlin where a panel of jurists edited the data and published it in pamphlets for use by colonial officials.⁸

(b) South African administration: 1915 to 1990

When South Africa took over control of South West Africa under mandate from the League of Nations, Roman-Dutch law was introduced as the basic legal system of the territory.⁹ The new administration continued to observe territorial divisions imposed during the period of German rule. A 'red line' divided a 'police zone' in the southern sector from the northern territories. The reserves established within this zone were governed by white officials (designated 'superintendents') with the assistance of traditional leaders.¹⁰ Outside the police zone, limited finances forced the authorities to accept a de facto situation of indirect rule.¹¹

It was only in the early 1920s that South Africa finally established a uniform national policy for its own African population. This policy - one broadly in line with the British idea of indirect rule - was then extended to South West Africa. A Native Administration Proclamation of 1928,¹² the enactment introducing these measures, was a carbon copy of South Africa's Native Administration Act.¹³ Under the Proclamation, the Administrator of the territory was given the authority to recognize and appoint traditional

structures were not formally incorporated into colonial government (as happened in the anglo- and francophone colonies), they were used as unofficial adjuncts of district administration.

⁶Adam (1929) 44 and (1931) 46 *Zeitschrift für Vergleichende Rechtswissenschaft* 444 and 455, respectively; Redmayne & Rogers 'Research on customary law in German East Africa' (1983) 27 *JAL* 22ff.

⁷See Kohler (1897) 12 *Zeitschrift für Vergleichende Rechtswissenschaft* 427ff. For an English translation of the amended copy of Kohler's questionnaire see Redmayne & Rogers op cit. The study focused on the Herero, Dama and Nama peoples.

⁸The findings of the project were also published by Schultz-Ewerth & Adam in two volumes - *Das Eingeborenenrecht: I Ostafrika* (1929) and *II Togo, Kamerun, Südwestafrika und die Südseekolonien* (1930) - and in several short articles in the *Zeitschrift für Vergleichende Rechtswissenschaft*.

⁹Proclamation 21 of 1919 provided that the Roman-Dutch law of the Cape was to be the general law of South West Africa and that all laws in conflict therewith were repealed to the extent of the conflict. While this enactment might have indicated that *all* customary law should be repealed, *Kakujaha & others v Tribal Court of Okahitua & others* Supreme Court SWA (20/03/89 unreported) 9 held that customary law was not overridden 'except for those instances where legislation specifically so provides'. See too *Kaputaufa v Executive Committee Administration for the Hereros* 1984 (4) 295 (SWA). See *R v Goseb* 1956 (2) SA 696 (SWA) for interpretation of the term 'Roman-Dutch law'.

¹⁰Whose powers were defined by GN 68 of 1924.

¹¹Gordon 1991 *Acta Juridica* 89-90 cites the example of the Kuanyama area, where indigenous courts (recognized de facto) became a model for the successful implementation of indirect rule.

¹²Section 8 of Proc 15 of 1928. See too Evans *Native Policy in Southern Africa* 138 and 151.

¹³38 of 1927.

leaders and to prescribe their duties and powers.¹⁴ Indigenous political leaders were then co-opted to the service of the South African regime.¹⁵

Consonant with South Africa's native policy, a new cadre of administrative officials was put in overall charge of African affairs. The 'native commissioners' were given judicial powers to hear civil cases between Africans¹⁶ and s 9(1) of the Native Administration Proclamation declared that:

*'Notwithstanding the provisions of any other law, it shall be in the discretion of the courts of native commissioners in all suits or proceedings between natives involving questions of customs followed by natives, to decide such questions according to the native law applying to such customs except in so far as it shall have been repealed or modified: Provided that such native laws shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of ovitunya or okuonda or other similar custom is repugnant to such principles.'*¹⁷

The commissioners' courts were maintained until 1985, when, following legislative adjustments in South Africa,¹⁸ they were abolished and their jurisdiction transferred to magistrates' courts.¹⁹

For many years s 9(1) of the Native Administration Proclamation was the only statutory provision regulating application of customary law.²⁰ It was repealed in 1985, when the commissioners' courts were abandoned,²¹ and it has not been replaced. Until independence, Namibia had no formal provisions recognizing customary law and its place in the national legal order.

¹⁴Section 1(a) of Proc 15 of 1928. GN 60 of 1930 introduced regulations to specify the duties and powers of chiefs and headmen, and s 1(g) gave the Administrator all the power and authority that a supreme or paramount chief enjoys under customary law.

¹⁵Hence, according to the Report of the South African representative to the United Nations in 1946 (as quoted by Olivier (n1) 173) the administration declared that it would 'indulge in the minimum of interference in tribal government'.

¹⁶Jurisdiction was excluded in certain areas, namely, issues of mental capacity, decrees of perpetual silence, namptissement and wills. South West African commissioners could, however, unlike their South African counterparts, hear issues arising out of civil or Christian marriage. Procedure was governed by regulations issued under GN 59 of 1930.

Although under s 11 of Proc 15 of 1928 appeals lay to the Supreme Court of South West Africa, according to a survey of Supreme Court records from 1920 to 1985 no civil appeals were in fact registered. An official explained that: 'The disputes that arise between Native and Native are usually very trivial and generally settled out of court. The cases brought to court are as a rule actions for divorce' See Olivier (n1) 227.

¹⁷This provision was copied from s 11(1) of South Africa's Native Administration Act 38 of 1927.

¹⁸In response to the Hoexter Commission of Inquiry into the Structure and Functioning of the Courts *Fifth Report* Part V, which had recommended abolition of commissioners' courts in South Africa because of their close association with the apartheid regime.

¹⁹Section 10 of Act 27 of 1985.

²⁰Apart from ss 17 and 18 of the Proclamation, which regulated property rights in case of civil/Christian marriage and succession.

²¹Section 5 of Act 27 of 1985.

(c) Independence

Article 66 (1) of the 1990 Constitution declared that:

'Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.'

This provision endorsed the validity of whatever customary laws were in force at the time of independence and determined their relationship to the Constitution and statutory law.²² Recognition of customary law as part of the Namibian legal system was only implicit.

Five years later, the Traditional Authorities Act expressly acknowledged the existence of customary law, but only within the context of courts of chiefs and headmen. In terms similar to an earlier South African enactment,²³ traditional rulers are empowered 'to hear and settle, subject to customary or statutory law, disputes over any customary matter between members of that traditional community'.²⁴ Customary law is defined in s 1 of the Act to mean:

'the customary law, norms, rules, traditions and usages of a traditional community in so far as they do not conflict with the provisions of the Constitution or of any other written law applicable in Namibia.'

If the proposed Community Courts Bill becomes law, customary law will receive further statutory recognition, although again only in a restricted context.

From the above, it is evident that customary law is accepted along with the common law as part of the law of Namibia. Nevertheless, there is no provision allowing magistrates' courts or the superior courts to apply customary law nor have rules been enacted to determine when customary law should apply to particular suits.²⁵

2 APPLICATION OF CUSTOMARY LAW

(a) Choice of law: judicial discretion

In the absence of any statutory choice of law rules, courts confronted with the problem when and in what circumstances to apply customary law will have to resort to basic principles governing the conflict of laws.

²²And under art 66(2) Parliament may repeal or modify 'any part of such common law or customary law' and may confine the application thereof to particular parts of Namibia or to particular periods. To declare that customary law may be applied only in so far as it does not conflict with legislation is unnecessary, however, since all laws in the country must be read subject to the latest statutes in force: Bennett (1981) 30 *ICLQ* 86-7.

²³Giving chiefs' and headmen's courts civil and criminal jurisdiction: Proclamation R348 of 1967.

²⁴Section 10(3)(b).

²⁵'Common law' is used in a broad sense to denote all law that is not customary, irrespective of whether a particular rule derives from judicial precedent, legislation or the Roman-Dutch authorities. In a conflict of laws context, however, it should be appreciated that, strictly speaking, courts have no discretion whether or not to apply statute: they may choose only between customary law and common law in its narrow sense.

The conflict of laws is a generic discipline designed to establish what law should be applied in situations where rules from two (or potentially even more) different legal systems have a bearing on the same set of facts. With no express legislative guidelines, courts must assume that the application of customary law is a matter of discretion. Accordingly, the Namibian courts are free to adopt principles laid down in South Africa, from which s 9(1) of the 1928 Native Administration Proclamation was derived.²⁶

The latter enactment did not in fact provide any specific choice of law rules.²⁷ The decision whether to apply customary or common law was left to the discretion of commissioners' courts. In the early 1930s certain South African courts held that common law was, by default, generally applicable and that customary law could be invoked only in matters that were 'peculiar to Native Customs falling outside the principles of Roman-Dutch law'.²⁸ A contrary, and a perfectly justifiable interpretation considered customary law to be primarily applicable; the common law could be applied only in exceptional cases.²⁹

The South African Appellate Division eventually intervened to declare that neither customary nor the common law was *prima facie* applicable to any case.³⁰ As a result, South African courts were obliged to consider all the circumstances of a case, and, on the basis of that inquiry, without any prejudice in favour of common or customary law, to select the appropriate legal system.³¹ The courts were thus forced to create a set of choice of law guides that would remain true to the fundamental principles underlying application of personal laws in a multi-cultural legal order.

(b) Principles determining application of customary law

The courts' decisions were directed by two main considerations. The first was a deference to the personal inclinations of the parties.³² While it was assumed that in domestic matters Africans were bound by customary law, individuals were free to use common-law institutions,³³ and, depending on their previous relationships and the nature of prior tran-

²⁶Section 11(1) of the South African Native Administration Act 38 of 1927.

²⁷Situations of civil/Christian marriage and succession (which were governed ss 17 and 18 of Proc 15 of 1928) were an exception to this proposition. Note that these provisions are still valid.

²⁸*Nqanoyi v Njombeni* 1930 NAC (C&O) 13.

²⁹*Matsheng v Dhlamini & another* 1937 NAC (N&T) 89 at 92; *Kaula v Mtimkulu & another* 1938 NAC (N&T) 68 at 71; *Yako v Beyi* 1944 NAC (C&O) 72 at 77.

³⁰*Ex parte Minister of Native Affairs: in re Yako v Beyi* 1948 (1) SA 388 (A) at 396-401.

³¹It should be noted that choice of law was simplified by subjecting all aspects of an action, notably *locus standi*, to one legal system. Accordingly, once the law governing the main claim had been decided, it became applicable to any subsidiary questions, such as the appropriate defences and the amount of damages claimable: *Buthlezi v Msimang* 1964 BAC 105 (C).

³²Even though the courts have declared that the decision to apply customary or common law rests with the court and that the parties may not oust its discretion: *Moima NO v Matladi & another* 1937 NAC (N&T) 40; *Lebona v Ramokone* 1946 NAC (C&O) 14; *Ciya v Malanda* 1949 NAC 154 (S).

³³Thus persons subject to customary law have always been free to enter commercial contracts, civil/Christian marriages and execute wills. In certain African states, notably Zambia, Malawi and Nigeria, Africans were not permitted to make wills on the ground that the expectations of intestate

sactions, they could subject themselves to the common law. This approach could now be interpreted, in constitutional terms, as giving expression to the right to culture contained in art 19 of the Constitution: all individuals should be free to participate in whatever culture or culturally determined legal regime they choose.³⁴

If the courts could discover no clear common intention in the parties' actions, they fell back on the second guide: to apply customary law to those who adhered to an African culture.³⁵ A cultural affiliation was imputed to individuals by reason of their integration into a culturally defined community. The courts employed a strictly objective test which entailed investigating a person's participation in culturally marked activities.³⁶

Implicit in the courts' approach to choice of law process was a willingness to be directed by the parties' reasonable expectations in the circumstances of the case.³⁷ If litigants had agreed that a certain law should apply, the courts simply gave effect to the agreement.³⁸ Such an understanding might be express, but more frequently it had to be inferred from conduct.

Here it might be noted that in practice such tacit agreements can be deduced from the pleadings: plaintiff's summons gives the first clue as to which legal system has been selected as the basis of a claim (ie the nature of the remedy or the type or quantum of damages sought).³⁹ If the defendant does nothing to contest this selection, the court may infer acquiescence.⁴⁰ Where the defendant disputes the plaintiff's choice of law, as it appears *ex facie* the summons, the court has then to determine whether the parties contemplated a particular legal system at an earlier stage of their dealings.

This inquiry entailed close examination of the words and deeds out of which a claim arose, an investigation that often led to a prior transaction on which the suit was

heirs would be upset. See *Morris* (1970) 14 *JIL* 5 and see *Himonga* (1991) 24 *Verfassung und Recht* 356. In southern Africa, testamentary capacity was never seriously considered. Cf *Fraenkel NO & another v Sechele* 1964 HCTLR 70 at 78-9 and 82.

³⁴The freedom to participate in a culture of choice has precedent in the statutory procedure (available under s 23 of Proc 15 of 1928) that allows an individual who is deemed to be sufficiently acculturated to a western lifestyle to apply for permanent exemption from customary law. See *Bennett Application* 76-7. The effect of exemption was never altogether clear. Although individuals exempted became subject to common law in matters of personal status, they remained bound by customary obligations incurred before the change of law: *Kaula v Mtinkulu & another* 1938 NAC (N&T) 68; *Ngcobo v Dhlamini* 1943 NAC (N&T) 13. Cf *Miya v Nene* 1947 NAC (N&T) 3.

³⁵Both customary and common law are deemed to be 'personal' legal systems in that they are attributed to persons rather than places: *Bennett Application* 1.

³⁶*Bennett Application* 7.

³⁷*Bennett Application* 105-6.

³⁸It is only where there happens to be a mandatory *choice of law* rule, such as the ones contained in s 17 of Proc 15 of 1928, that the parties are not free to choose a law.

³⁹*Mbaza v Tshewula NO* 1947 NAC (C&O) 72.

⁴⁰Hence, if the plaintiff had relied a particular system of law to bring a claim, he or she was precluded from objecting to the defendant's use of defences under the same system: *Warosi v Zotimba* 1942 NAC (C&O) 55 at 57. And, conversely, if the defendant had raised a defence known to only one system of law, he or she was estopped from objecting to the plaintiff's reliance on the same system: *Goba v Mtswalo* 1932 NAC (N&T) 58.

based. Undertakings, such as bridewealth and loans of cattle, pointed to customary law,⁴¹ while the commercial contracts typical of the common law invited application of common law.⁴² If a transaction was known to both legal systems, the parties' use of a form peculiar to one was usually decisive in evincing an intention to abide by that system. For instance, where the parties had married in church or in a registry office, the form of the ceremony suggested the applicability of common law to issues associated with the marriage.

Where a juristic act lacked any cultural markers, however, the courts delved even deeper into the circumstances in which it occurred in order to discover a general cultural alignment. Thus, the purpose of a transaction, the place where it was entered into and its subject matter were all used as indicia of an implied choice of law.⁴³

In suits not involving prior transactions, such as those arising out of delicts or family relationships, the courts looked to the parties' lifestyles as a guide to an overall cultural orientation and thus choice of law. People who adhered to a typically African way of life were deemed to be subject to customary law, while those who had become acculturated to a western lifestyle were considered subject to the common law.⁴⁴ The predominance of a particular lifestyle enabled the courts to ascribe an expectation to the parties that a certain law would govern their relationships.⁴⁵

Where the courts were unable to fasten choice of law onto a formal exemption from customary law,⁴⁶ an underlying concurrence of wills or a shared lifestyle, they were hard-pressed to decide which law to apply. Plaintiffs who claimed damages on a common-law scale, higher than would be permitted under customary law, occasioned particular problems,⁴⁷ for the courts were reluctant to prejudice defendants.⁴⁸ (The unfortunate result, however, was to condemn Africans to the strictures of customary law

⁴¹*Nxumalo v Ngubane* 1932 NAC (N&T) 34. See, for example, bridewealth transactions: *Peme v Gwele* 1941 NAC (C&O) 3 and *Fuzile v Ntloko* 1944 NAC (C&O) 2.

⁴²*Dhlamini v Nhlapo* 1942 NAC (N&T) 62; *Maholo v Mate* 1945 NAC (C&O) 63.

⁴³*Mhlongo* 1937 NAC (N&T) 124; *Sawintshi v Magidela* 1944 NAC (C&O) 47. See, too, *Mpi-kakane v Kunene* 1940 NAC (N&T) 10 and *Warosi v Zotimba* 1942 NAC (C&O) 55.

⁴⁴In two cases from Lesotho, *Mokorosi v Mokorosi & others* 1967-70 LLR 1 and *Hoohlo* 1967-70 LLR 318, for instance, the courts investigated details as diverse as the parties' place of residence, occupation, religion, education, style of dress, eating and sleeping habits, use of bank accounts, preparation of wills and consultation with attorneys. See, too, the Zambian case *Munalo v Vengesai* 1974 ZLR 91 (and comment in (1981) 13 *Zambia LJ* 62).

⁴⁵See, for instance, *Ramothata v Makhothe* 1934 NAC (N&T) 74 at 76-7.

⁴⁶Under s 23 of the Native Administration Proc 15 of 1928.

⁴⁷The typical cases were women claiming damages for seduction (*Yako v Beyi* 1944 NAC (C&O) 72) and men claiming increased damages adultery (*Ndodoza v Tshaniwa* 1939 NAC (N&T) 64; *Nazo v Lubisi* 1946 NAC (C&O) 18).

⁴⁸As McLoughlin P said in *Yako v Beyi* supra at 76: 'To do justice with equity in these circumstances the Court must apply the system of law equally to all individuals of the community subject thereto without favouring one or other party by allowing him or her to have recourse to another system of law, to avoid restrictions of Native Law in so far as that party is concerned, or to enable that party to obtain a greater benefit than the native system provides.'

whatever their personal inclinations might have been.)⁴⁹ In another series of cases, the courts held that plaintiffs should not be denied a claim merely because none was available in customary law. They felt that plaintiffs, as subjects of the state, were fully entitled to make use of the law of the land.⁵⁰ In these cases, for no apparent reason, the fate of the defendant was disregarded.

The Constitution now puts this conundrum into a different perspective. A party's claim that the common law be applied instead of customary law may flow from the right to pursue a culture of choice under art 19 of the Constitution. But this freedom is not absolute, for in principle the exercise of a freedom by one person should not violate another person's rights.⁵¹ Consequently, where rights have been acquired under customary law, the courts would be obliged to protect them on the understanding that both parties could reasonably have been expected to be bound by customary law.⁵²

Another line of inquiry would be to consider who bears the duty in relation to the right.⁵³ Where an individual has a right to participate in a culture under art 19, his or her right is opposable against the state. Only if horizontal application of the right were permitted, could the right be invoked against other individuals. In other words, a right to culture carries no obligation for individuals, it only entitles them.⁵⁴

(c) The 'repugnancy proviso'

Under s 9 (1) of the 1928 Proclamation, application of customary law used to be subject to two provisos: that customary law was not repugnant to public policy and natural justice - the so-called 'repugnancy proviso'⁵⁵ - and that it had not been repealed or modified.⁵⁶

⁴⁹*Mashego v Ntombela* 1945 NAC (N&T) 117 at 121 and *Ngwane v Nzimande* 1936 NAC (N&T) 70.

⁵⁰*Mangwane v Nontana & another* 3 NAC 98 (1914); *Mlondleni v Magcaka* 1929 NAC (C&O) 10. Hence, as the court in *Muguboya v Mutato* 1929 NAC (N&T) 73 at 78 held, it would be a 'travesty of natural justice and a violation of the fundamental right to inviolability of person to which everybody is entitled' not to allow the common-law claim.

⁵¹See below ch III.

⁵²There may be circumstances where it would be unreasonable and unnecessary to defeat customary interests. For instance, members of a family may have a reasonable expectation under customary law that the family estate be maintained for their enjoyment. The head of the family should not in these circumstances be entitled to alienate assets in terms of the common law.

⁵³*Kaganas & Murray* (1994) 21 *J Law & Society* 415-17 and 424-5 adopt a different approach. They look to the general tenor of the Constitution and conclude that it is in favour of an individual right to non-discrimination rather than a right to culture.

⁵⁴See *Ex parte Cabinet for the Interim Government of SWA: in re Advisory Opinion in terms of s 19(2) of Proc R101 of 1985* 1988 (2) SA 832 (SWA) at 856. See, too, the judgment in *Thomas v Norris* [1992] 2 CNLR 139 (BCSC).

⁵⁵A third proviso exempting bridewealth from the purview of the repugnancy clause was a special dispensation intended to correct a ruling, originally from the Transvaal, that bridewealth transactions could not be enforced because they were 'uncivilized': *Kaba v Ntela* 1910 TPD 964 at 969.

⁵⁶A proviso retained in art 66 of the Constitution.

The repugnancy proviso, a hallmark of colonial rule in Africa, was the main restriction on an otherwise blanket recognition of customary law. Although worded differently in the various colonies, the clause was everywhere intended to serve the same function: to prevent enforcement of customary laws or practices offending western moral standards. In practice, the courts of anglophone Africa were reluctant to interfere with customary law.⁵⁷ They invoked the proviso in only a handful of cases,⁵⁸ most of which concerned freedom of marriage,⁵⁹ and in Namibia no such cases have been reported.⁶⁰

The repugnancy proviso did not survive repeal of the 1928 Proclamation. While it is now little more than a reminder of the presumption of the colonial regime, it still has a salient function: to guide us to the areas of customary law which impressed previous courts 'with some abhorrence' or obvious 'immorality'.⁶¹ These are areas where, in contemporary thinking, customary law should be overruled in favour of constitutional rights.

(d) The conflict of laws and fundamental rights

When, in terms of the choice of law guides indicated above, the common law is held to be applicable to a dispute, no further question is likely to arise about conflicts with the fundamental rights.⁶² Hence, a court wishing to avoid the difficult decisions whether to apply the Constitution to private relationships or whether to limit human rights by customary law could temporize by simply applying common law.⁶³ By implication, although no permanent decision would have been reached on the constitutional validity of a customary rule, individual litigants would be given ad hoc relief.

If the conflict of laws is to be utilized in this way, it needs to be revitalized. Namibian courts and their predecessors have done little to develop this discipline. It is facile to assume that customary law should be applied to Africans simply because they are

⁵⁷They refused to use the repugnancy proviso in a legislative manner: *Dumalitshona v Mraji* 5 NAC 168 (1927); *Maguga v Scotch* 1931 NAC (N&T) 54. Enonchong (1993) 5 *Afr J Int & Comp L* 503ff notes the distinct reluctance of anglophone (as opposed to francophone judges) to upset customary law on this ground.

⁵⁸The courts' hesitance was understandable in one respect, because if they had used the concept of repugnancy too freely they would have nullified most of the rules of customary law, making recognition of the system an empty gesture. See *Meesadoosa v Links* 1915 TPD 357 at 361.

⁵⁹*Gidja v Yingwane* 1944 NAC (N&T) 4 is a typical case. Other examples were cases where customary law encouraged sexual immorality (*Palamahashi v Tshamane* 1947 NAC (C&O) 93 and *Linda v Shoba* 1959 NAC 22 (NE)), favoured the right of an illegitimate child to succession (*Dumalitshona's* case supra; *Madyibi v Nguva* 1944 NAC (C&O) 36; *Qakamba & another v Qakamba* 1964 BAC 20 (S)) or simply appeared unjust.

⁶⁰Nevertheless, administrative action was occasionally taken against certain practices considered incompatible with public policy or natural justice. See Olivier (n1) 247-8 and Gordon (n11) 94 n29. See further Olivier (n1) 196-8 and 243 and *S v Ashikoto et al* 1967 SWA (unreported, but cited by Gordon (n11) 95). Peart 1982 *Acta Juridica* 116 claims that the proviso has outlived its usefulness.

⁶¹*Chiduku v Chidano* 1922 SR 55 at 58.

⁶²Assuming that common law is in accord with the fundamental right in question.

⁶³See discussion by Bennett (1980) 18 *J Modern African Studies* 127.

African. Effect should be given to socio-economic transformations by applying common law to those who no longer consider themselves part of an African cultural tradition.⁶⁴

If the the conflict of laws is to be used more creatively, rules regulating application of customary law must be promulgated. The current lacuna in Namibian law is arguably an infringement of fundamental rights,⁶⁵ for a human rights order presupposes at the very least certainty as to which laws should be enforced.

What is more, constitutional norms should be used as standards to direct the choice of law process. Where a plaintiff and a defendant's interests diverge on account of an underlying conflict of laws, the choice of one or other legal system should be determined by reference to the chapter on fundamental rights. This would be a novel approach, for choice of law is traditionally considered a mechanical process with no regard to the ultimate result. It is assumed that, whichever rule is applied to the facts, a just decision will be produced.⁶⁶ Because a bill of rights is a transcendent code of norms, however, it could be argued that the conflict of laws should no longer remain value-blind. Should application of customary law result in unfair discrimination, then arguably the common law could be applied in its place.⁶⁷

3 PROOF AND ASCERTAINMENT OF CUSTOMARY LAW

(a) The 'living' and 'official' versions of customary law

Namibian courts tend to treat customary law in much the same fashion as Roman-Dutch law, which means that they take judicial notice of its rules.⁶⁸ All forms of customary law find the basis of their validity in accepted social practice, however, so, if a rule of customary law is asserted in legal proceedings, the question may well arise whether the documented version of it is an authentic representation of current social practice. A rule imposed by an external authority or one lacking any local support should be deemed invalid.

The leading case on judicial recognition of customary law in Namibia is *Kaptuaza & another v Executive Committee of the Administration for the Hereros & others*.⁶⁹ The court held that Herero 'customary law'

⁶⁴Accordingly, if an individual adopts a new set of social norms and attitudes, the conflict of laws (which expresses this as a change of personal law) operates to reflect social change. In South Africa, women in particular were restricted to the confines of customary law by reasoning that, if one party were given the benefit of a change in personal law, the other would be put at a disadvantage.

⁶⁵Van der Vyver (1982) 15 *CILSA* 312-14.

⁶⁶For customary law, the repugnancy proviso provided a safety net of sorts: rules that were clearly incompatible with natural justice or public policy were not applied.

⁶⁷Provided, of course, that that system would secure a result more in accord with ch 3 of the Constitution.

⁶⁸By contrast, the South African Supreme Court used to regard customary law as if it were the same as the common-law custom. It followed that, in each case in which it arose, a rule had to be proved by calling witnesses: *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 (1) SA 388 (A) at 394-5; *Mosii v Motseoakhumo* 1954 (3) SA 919 (A) at 930; *Masanya v Seleka Tribal Authority & another* 1981 (1) SA 522 (T) at 524. See Kerr (1957) 74 *SALJ* 313ff.

⁶⁹1984 (4) SA 295 (SWA) at 301.

'is part of the law of South West Africa of which the Court can take judicial notice; consequently it need not be proved in the same manner as foreign law. In the process of taking judicial cognisance this Court may inform itself from history books.'

'Customs observed in the reserve', on the other hand, the current social praxis, had to 'be proved in the same manner as any other custom'. Whether the court was right to place such reliance on customary law recorded in historical and other texts is questionable, for many of these sources are of dubious validity. In fact, the term 'customary law' is now regularly accompanied by the qualifying adjectives 'living' (to denote the law actually observed by African communities) and 'official' (to refer to the rules employed by the legal profession).⁷⁰

Because a living form of customary law is distilled directly from current social praxis, it is subject to continual and imperceptible change.⁷¹ Unlike western law, which is fixed by legislation or precedent, it tends to be both volatile and uncertain,⁷² qualities that make it difficult to apply in western-style courts. For tribunals of the western type, a genuine system of custom can never be immediately accessible, because the courts are socially divorced from the communities they serve.⁷³

'Official' versions of customary law tend to depict custom in terms of western legalese. As Chanock wrote in *Law, Custom and Social Order*,⁷⁴ the subtle and fluctuating obligations of African marriage have been refashioned into rights and duties that bring it into line with a western legal discourse. When reducing customary law to writing, authors brought their common-law training to bear. Customary rules were grouped into common-law categories, such as marriage, succession and property, and common-law concepts were freely used to describe customary institutions.⁷⁵

Revisionist historians have claimed that the 'tradition' which 'official' customary law seeks to reflect was 'invented'. This epithet is meant to warn us that customary rules owe less to ancient practice than to the interests of European writers and officials.⁷⁶ Colonial occupation put settlers into a dominant position, one that allowed them to become arbiters of the African cultural heritage: they documented it and they determined

⁷⁰See Sanders (1987) 20 *CILSA* 405ff.

⁷¹And it will probably exist only in an oral tradition. See the discussion by Hamnett *Chieftainship and Legitimacy* 10-13 of the qualities that typify 'customary' law.

⁷²Instead of being fixed until publicly and officially changed by the law-maker. Age, the legitimating force of customary law, however, guaranteed its stability.

⁷³Since all important litigation about the relationship between customary law and human rights will take place in western-style courts, the problem of discovering authentic customary rules will be most acutely felt in these forums.

⁷⁴Chapters 10 and 11.

⁷⁵At the same time, devices of precedent, codification, and restatement were used in South Africa to impose western requirements of certainty and stability.

⁷⁶In other words, the rules represented less what people were actually doing and more what the colonial government and its chiefly rulers thought they ought to be doing. The notion of the 'invented tradition' was introduced to the study of customary law by Chanock *Law, Custom and Social Order* (1985). See further Gordon (1989) 2 *J Historical Sociology* 41 and Sanders (n70).

how it was to be interpreted.⁷⁷ The legitimacy of the colonial system of justice depended largely on customary law being cast as a continuing tradition, a regime with origins in an autonomous, pre-colonial African past.⁷⁸

The customary law of the former South West Africa did not escape these problems. Works, such as Hahn, Vedder & Fourie *The Native Tribes of South West Africa* (1928) and Vedder *South West Africa in Early Times* (1938), are typical in the way that they present an harmonious, unchanging African social order.⁷⁹ In addition, customary law was manipulated by 'indigenous elites and colonizers' to further their own ends.⁸⁰

*'The use of "customary law" by the state was an essential part of its strategy of co-optation of chiefs and other petty political figures into the control apparatus. A common ploy in such situations, was the informalization of adjudication under the label of "customary law".'*⁸¹

A particular failing of official codes was the way in which they recorded the position of women. Most accounts were compiled during the late nineteenth century and the first half of the twentieth century, a time when techniques of ethnographic fieldwork were still rudimentary. The European administrators, missionaries and anthropologists who were responsible for gathering data, were unwittingly blinkered by their own culture, and, until recently, European culture was also patriarchal. Little was done to guard against gender bias.⁸² In consequence, the issues explored by fieldworkers and the ways of exploring them were determined largely by male interests.⁸³

These preconceptions and partialities became even more pronounced when information was being sought for legal purposes. Because it was assumed that men controlled the law and the courts, informants were nearly always male elders.⁸⁴ Moreover, the then prevailing conception of law - a set of ideal norms or what exemplary behaviour in a particular community should be⁸⁵ - heavily influenced ethnographic

⁷⁷In its search for information, the administration naturally turned to local rulers, for they were considered to be repositories of wisdom and authority. What patriarchal elders told the administration was what they thought appropriate behaviour ought to be, regardless of the extent to which current behaviour might have diverged from the past. Moreover, because tradition was the source of an African leader's legitimacy, replies tended to be formulated in terms of tradition: Rwezaura *Traditionalism and Law Reform in Africa* 22.

⁷⁸See Burman (1979) 12 *Verfassung und Recht* 129.

⁷⁹See Bley (n5) xxi.

⁸⁰For example, to legitimate practices by chiefs to exact of dues and tributes: Gordon (n11) 93-6.

⁸¹Gordon (n11) 99-100.

⁸²Becker & Hinz *Marriage and Customary Law in Namibia* 11 note, too, the tendency for South African scholars of the 1960s and 70s to generalize Namibian data on the basis of South African law.

⁸³Becker *Namibian Women's Movement 1980 to 1992. From Anti-colonial Resistance to Reconstruction* 55-9.

⁸⁴Bacrends (1990-91) 30/31 *J Legal Pluralism* 38.

⁸⁵Llewellyn & Hoebel *The Cheyenne Way* 20-9, in developing a typology of legal research methods, called this an 'ideational' approach. The more usual term today is 'rule-centred': Comaroff & Roberts *Rules and Processes* 5ff. This method has been widely used in Africa in the preparati-

method. What is now called a 'rule-centred' paradigm, tended to blur or conceal many of the rights and powers actually enjoyed by women.⁸⁶ Customary law emphasizes the relations of families as groups. Norms governing the interaction of individuals within families are of less account; they are usually referred to in terms of morality or convention. The rule-centred paradigm had the effect of eliding such intrafamilial rights and duties, partly because elders probably did not think them worth mentioning, and partly because such norms did not readily translate into western legal terms.⁸⁷

The spirit of gender equality has reached most Namibians,⁸⁸ and many informants in Namibia claim that contemporary customary law is gender-blind. Nevertheless, women do not in fact enjoy the same rights and powers as men. Namibia is experiencing a period of transition, when two normative orders are dialectically engaged. The ambiguities in customary law now pose a major theoretical problem: should the *idea* of gender equality or the *practice* of discrimination inform notions of the 'living law'?⁸⁹

(b) Proof of customary law

Gender studies in Africa have revealed that women receive less sympathetic treatment in the higher courts, where judges apply the official version of customary law.⁹⁰ So it happens that women have a more favourable hearing in traditional courts. These tribunals may be controlled by traditional rulers,⁹¹ but they are more concerned with substantive justice and they are more responsive to shifts in local attitudes and practice than the higher courts.⁹²

on of codes and restatements of customary law, and it typifies most of the South African ethnographies, especially those of the 'jural' school of anthropology. See Hund (1982) 8 *Social Dynamics* 30-1.

⁸⁶See Armstrong et al (1993) 7 *Int J Law & Family* 324-9 regarding the process of creating customary law and the implications different versions have for litigants.

⁸⁷See Chanock (n76) chs 10 and 11. For instance, although wives had the right to demand land from their husbands, this right would be regarded as 'informal', and thus not worthy of registration or protection by the general law: Baerends (n84) 37.

⁸⁸Becker 'Gender Aspects of Traditional Authorities and Traditional Courts in a Democratic society: Examples from Northern Namibia' paper delivered at a workshop on Traditional Authorities in the Nineties - Democratic Aspects of Traditional government in Southern Africa (1995) CASS Windhoek 17.

⁸⁹Becker op cit 11.

⁹⁰See, for example, *Maagwi Kimito v Gibeno Werema* CA Civ App 20/84 (unreported) (discussed by Bakari (1991) 3 *Afr J Int & Comp L* 549ff).

⁹¹See Armstrong et al (n86) 328, and the specific studies by Ndulo (1985) 18 *CILSA* 90 and Coldham (1990) 34 *JAL* 67. Wanitzek (1990-91) 30/31 *J Legal Pluralism* 255ff, especially at 263ff, lists common problems faced by female litigants, notably, ignorance of procedures and the substantive law, and an inability to frame their claims in legal terms. Where women might expect a more sympathetic audience in the lower courts, which are less inclined to technicality, they find proceedings dominated by conservative men. In the High Court, on the other hand, a woman is likely to lose her claim for failing to plead correctly. As a result (at 268), women are unwilling to go to court, and they do so only as a last resort. Baerends (n84) 68, too, concludes that women are ill-advised to litigate on their rights, since they risk, inter alia, ostracism by their families.

⁹²Unlike western-style courts, they do not feel bound to apply pre-ordained rules to facts. Women nevertheless complain that male headmen do not take their problems seriously. See Becker (n88) 15.

Constitutional litigation, however, will inevitably occur in the higher courts, fora that are socially distanced from litigants and concerned with formal justice. Thus a critical issue will be whether the rules of customary law advanced are mythical stereotypes that have become ossified in the official code or whether they continue to enjoy social currency.

In principle litigants should not be bound by the official code. They should be free to contest whatever rules are adduced in court. Judges themselves are generally reluctant to initiate investigations into the law they apply;⁹³ they leave it to the parties to assert discrepancies between the official and the living versions of customary law. As a result, anyone who disputes to the official account will bear the onus of proof,⁹⁴ and this onus is a heavy one.

For purposes of proof, customary law must be treated as if it were the same as common-law custom.⁹⁵ And, in order to prove custom, witnesses⁹⁶ must be called to establish whether it was certain, reasonable and uniformly observed for a period of time.⁹⁷ The standard of proof is the same as that in all civil cases: a balance of probabilities.⁹⁸ If a party alleging a more reliable interpretation of customary law does not meet this standard, then the accepted code will prevail for want of better evidence.⁹⁹

In summary, although many of the documented sources of customary law are a poor reflection of current social practice, the official code will be the only version available in constitutional cases. (Its very availability has the effect of creating a de facto presumption in its favour.) To recover a more authentic version of in time to meet constitutional litigation will be a formidable task. A nation-wide project is necessary to reveal the true position, an undertaking requiring considerable expenditure of time and resources. When a report is ultimately produced, its legal status must be decided: will it

⁹³In South Africa, if a court were doubtful about the validity of a customary rule, it would inform the parties so that they could lead evidence of their own. *Rowe v Assistant Magistrate, Pretoria & Another* 1925 TPD 361 at 369-70 held that the court is not entitled to conduct an extra-curial investigation. There is some authority, in *Morake v Dubedube* 1928 TPD 625 at 631, however, for the court calling its own witnesses.

⁹⁴*Mosii v Motseokhumo* 1954 (3) SA 919 (A) at 930.

⁹⁵*Ex parte Minister of Native Affairs: in re Yako v Beyi* 1948 (1) SA 388 (A) at 394-5; *Mosii's* case supra at 930; *Masanya v Seleka Tribal Authority & Another* 1981 (1) SA 522 (T) at 524. Cf *Bekker* (1976) 39 *TIRHR* 359.

⁹⁶There are no particular rules specifying the qualifications required of the witnesses or how many witnesses need be called. The witnesses' function is ambiguous: they could be before the court to give an opinion as to the existence of a rule of customary law (in which case they must qualify as experts), or they could attest to its objective existence as a matter of fact. *Allott New Essays in African Law* 263-4. No pronouncement has been made on which role they perform. In the past preference was shown for traditional rulers: *Msimango & another v Cele* 1982 AC 233 (NE).

⁹⁷*Van Breda & Others v Jacobs & Others* 1921 AD 330. And see *Mazibuko* 1930 NAC (N&T) 143.

⁹⁸*Gecelo* 1957 NAC 161 (S). This rule is consistent with the general principles of the law of evidence, in spite of earlier intimations that the standard should be higher than in ordinary civil cases: *Dumalisile* 1948 NAC 7 (S); *Nomantunga v Ngangana* 1951 NAC 342 (S).

⁹⁹See, for example, *Ruzane v Paradzai* 1991 (1) ZLR 273 (SC) at 278. Alternatively, this could be a ground for applying fundamental rights in terms of the doctrine of *mittelbare Drittwirkung*. See below ch IV.

function as a code, a restatement (and therefore prima facie binding) or simply as more up-to-date documentary evidence?¹⁰⁰

¹⁰⁰And what evidential value would the report have in court? Would it be treated as a binding code, a prima facie binding restatement or the equivalent of privately adduced evidence?

III CUSTOMARY LAW AS A RIGHT TO CULTURE

1 THE RIGHT TO CULTURE IN INTERNATIONAL LAW

As mentioned in ch I, indigenous peoples throughout the world have merged culture with claims to self-determination and control of ancestral lands. Culture has accordingly become one of the more dynamic areas of international human rights law. Article 144 of the Constitution provides that 'the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia'.¹ Hence recognition of customary law in Namibia is bound to be influenced by developing international norms with regard to recognition of the social and legal institutions of native communities.

(a) Minority protection

The basis of a legal right to culture can be found in a state's duty to guarantee the rights of minorities within its borders, ie groups of people defined by common bonds of culture, language or religion.² Article 27 of the 1966 International Covenant on Civil and Political Rights provides that:

'persons belonging to ... minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'.

Although Namibia has ratified the Covenant, international treaties do not normally create binding rights and duties for individual citizens of party states. A treaty becomes a source of private rights only when it is incorporated into municipal law by legislation.³ Article 144 of the Constitution, however, would suggest that art 27 of the Covenant is now an enforceable rule of Namibian municipal law; it did not require incorporation by legislation.⁴

It is not entirely clear who is supposed to benefit from the rights contained in art 27. The article speaks of 'persons' pursuing their rights - and it is generally accepted that

¹ See *Kauesa v Minister of Home Affairs & Others* 1995 (1) SA 51 (NmHC) at 87.

² This duty emerged soon after the First World War, when a series of treaties was concluded with respect to the newly formed states of eastern Europe. See the general account given in Thornberry *International Law and the Rights of Minorities* ch 3. After 1945 these treaties lapsed, and the task of securing protection for minorities passed to the United Nations.

³ *Pan American Airways v SA Fire & Accident Insurance Co* 1965 (3) SA 150 (A) and *Binga v Administrator SWA* 1984 (3) SA 949 (SWA); 1988 (3) SA 155 (A).

⁴ See further on the relationship between international law and Namibia's municipal law: Devine (1994) 26 *Case Western Reserve J of Int L* 300ff, who (at 304) discusses *S v Carracelas* High Court 20 November 1992. Mere signature, of course, does not render a treaty binding; ratification by the National Assembly is also required.

individuals are the principal right-holders⁵ - but they may enjoy their culture only 'in community with the other members of their group', which might signify that the collectivity also has locus standi.⁶

Conventional minority rights are being supplemented by developments in international customary law, and such law is also directly binding on Namibian courts both in terms of art 144 of the Constitution and the common law.⁷ In 1992 the General Assembly adopted a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.⁸ This pronouncement gives people a right akin to art 27 of the International Covenant to participate in a culture of choice.⁹ In addition to their duty to protect the existence and identity of ethnic and cultural minorities,¹⁰ states are obliged to create 'favourable conditions' to enable persons belonging to such groups to express their characteristics and develop their culture.¹¹

Critical to establishing a group's rights is, of course, a status of minority, and it is on this score that any claim by Africans against the Namibian state to respect their culture is most likely to fail. In order for a collection of people to qualify as a minority, they must pass two tests: they must be distinguished by common ethnic, religious or linguistic bonds¹² and they must be subordinate to another group or groups.¹³ While Africans would have little trouble complying with the first part of the definition, they would find it more difficult to meet the requirement of subordination.

Is a group characterized as a subordinate because it is smaller than other groups or because it wields less power? Opinions go both ways.¹⁴ If a numerical definition were

⁵It seems clear that the article is not seeking to protect the collective right of a *people* to further its culture, a right which is asserted in the Universal Declaration of the Rights of Peoples (1976): Protts in Crawford *The Rights of Peoples* 97.

⁶Alfredsson & de Zayas (1993) 14 *Human Rights LJ* 3; Thornberry (n2) ch 17.

⁷*Nduli v Minister of Justice* 1978 (1) SA 893 (A) and *S v Petane* 1988 (3) SA 51 (C).

⁸Resolution 47/135 of 18 December 1992 was adopted without a vote. The text is given in (1993) 32 *ILM* 911. The preambular provisions of the Declaration acknowledge the inspiration of art 27 of the International Covenant on Civil and Political Rights, and the declaration is clearly linked to human rights. Article 3, however, entitles persons belonging to minorities to exercise their rights individually as well as in community with other members of their group. See commentary by Alfredsson & de Zayas (n6) 1.

⁹Namely, under art 2, to enjoy their own culture 'without interference or any form of discrimination'.

¹⁰Article 1.

¹¹Article 4(2). Unfortunately, except for a phrase in art 3 about enjoyment 'in community with other members of the group', the Declaration does not specify whether the beneficiaries of these rights are groups or individuals.

¹²See art 27 of the International Covenant on Civil and Political Rights; Capotorti (1985) 8 *Encyclopedia of Public International Law* 385; Robinson (1971) 1 *Israel Yearbook on Human Rights* 61; Dinstein (1976) 25 *ICLQ* 104-5.

¹³See Thornberry (n2) 6ff for a general definition.

¹⁴Crawford (1987) 2 *Law & Anthropology* 8 claims that minority has no necessary connection with the size of a group, whereas Capotorti *Study on the Rights of Persons belonging to Ethnic, Religious and Linguistic Minorities* (with special reference to art 27 of the International Covenant) assumes the opposite.

adopted, the position of blacks in Namibia during the period of South African rule would be anomalous - but then most people would have been prepared to make an exception, given the special circumstances of oppression.¹⁵ Since Namibia's Independence, however, Africans are neither a political nor a numerical minority. Presumably, only ethnic/cultural groups *within* the African population would be able to assert minority status vis-à-vis larger and more dominant groups.

(b) Self-determination

Minority rights have generally been overshadowed by the second major group right: self-determination. This right features both as a common art 1(1) of the International Covenants on Civil and Political and Economic, Social and Cultural Rights (1966) and as a rule of customary international law.¹⁶ By benefiting all 'peoples' self-determination avoids the troublesome question of defining the right-bearer.¹⁷

As far as content is concerned, the most publicized aspect of self-determination is the right it gives peoples to choose their own form of government and to decide what form of association they will have with their parent state or neighbouring states.¹⁸ In addition, self-determination allows a people the freedom to pursue their economic, social and cultural development,¹⁹ an entitlement revealing the close relationship between self-determination and minority protection.²⁰

It is arguable, none the less, that self-determination should be distinguished from minority protection in two respects. First, a minority's right implies that the government or state has a duty not to discriminate against members of the group.²¹ Secondly, minority protection emphasizes the state's duty to allow the group to foster its separate identity through means such as maintaining its own schools,²² speaking its language,²³ worshipping according to certain religious tenets or adhering to its own system of

¹⁵See Thornberry (n2) 8-9 on the position of blacks in South Africa under apartheid rule.

¹⁶See the ICJ decision in *Legal Consequences for States of the Continued Presence of SA in Namibia* 1971 ICJ Reports 16 at 31.

¹⁷The concept of a people has both objective and subjective elements, an implication recognized in art 1(2) of the 1989 ILO Convention on Indigenous and Tribal Peoples. By sharing a common historical tradition, the collectivity must be regarded by others as separate and distinct, and subjectively the group must consciously have identified itself as different from other groups. See McCorquodale (1994) 10 *SAJHR* 10-11 and Dinstein (n12) 104.

¹⁸Rigo Sureda *The Evolution of the Right of Self-Determination* 226; Cassese *UN Law: Fundamental Rights* 137-47.

¹⁹See the common art 1(1) of the international human rights Covenants (1966).

²⁰Both rights inhere in groups, and minority cultural groups are typically the ones that seek self-determination. Furthermore, the 'peoples' who bear the right to self-determination are defined in terms similar to those that characterize minorities: they must be ethnically, culturally, linguistically, or religiously distinct. See Kiwanuka (1988) 82 *Am J Int Law* 80 and Dinstein (n12) 104-5.

²¹Thus minority protection combines a norm of equal treatment and a right to choose whether to be different: Thornberry (n2) 317.

²²*Minority Schools in Albania* (1935) PCIJ Advisory Opinion AB/64 17. Provision is made for this principle in art 20(4) of the Constitution.

²³Provision is made for this principle in art 3(2) of the Constitution.

personal law. The same duties are merely *implicit* in a right to cultural self-determination, in the sense that a people is in no position to benefit from its culture unless it is free from discrimination and able to maintain its own social institutions.

In international practice, claims to pursue a culture have seldom been advanced under the heading of self-determination. The right is asserted almost exclusively in political contexts, and it is generally interpreted restrictively to apply only to non-self-governing colonial peoples.²⁴ Besides, self-determination tends to be subject to the prior realization of human rights.²⁵

(c) Aboriginal rights

In the last forty years certain groups who happen to be particularly disadvantaged - aboriginal peoples - have begun to assert various rights in international law, inter alia, to free expression of culture, to land and natural resources and, more radically, to full political self-determination. It is in the wake of the movement to secure aboriginal rights that advocates of an African cultural tradition may find their most secure source of authority. Unqualified application of human rights, with the implication that indigenous peoples must be assimilated to a uniform national status, can be met by a demand that African cultures be given special respect, because they are both indigenous to Namibia and subordinate to a dominant western culture.

The concept of aboriginality still has no absolute definition in legal sources,²⁶ but the core meaning is habitation of a territory before the arrival of immigrant colonists.²⁷ Further key elements are a status of cultural subordination,²⁸ and the existence of certain social differences that set an aboriginal community apart from the state's dominant population.²⁹

²⁴And then only in territories qualifying under the so-called 'salt water' doctrine: see McNamara (1992) 21 *Manitoba LJ* 598-9. Moreover, because state practice is committed to support the integrity of state boundaries, an indigenous group would not be entitled to complete autonomy. Nettheim in Crawford (n5) 119-20, however, says that self-determination is a process, not the particular outcome of a process. Thus, while 'not embracing the possibility of complete independence against the wish of the encompassing national State, [self-determination] does permit as wide a range of other forms of association as the self-determining people might select'.

²⁵Article 5(1) of both the international Covenants on Civil and Political Rights and Economic, Social and Cultural Rights provides that group rights may not result in the destruction or impairment of any other right. A similar provision is found in art 17 of the European Convention on Human Rights.

²⁶Other than in the ILO Conventions.

²⁷Priority in time suggests another essential component of meaning: relativity. Crawford (n14) 5ff initiated a comparative investigation of 21 municipal legal systems. In all cases it was found that 'aboriginal' takes its meaning from a comparison with a non-aboriginal group. See too Lerner *Group Rights and Discrimination in International Law* 100-3.

²⁸Although, unlike other minorities, aboriginal people have a long historical association with the land: Crawford (n14) 9-10.

²⁹Crawford (n14) 7-8. This is borne out by the Indigenous and Tribal Peoples Convention 1989, which applies to both 'tribal' and 'indigenous' peoples. The former are defined in art 1(1)(a) as those 'whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations'. The latter are defined in art 1(1)(b) as indigenous 'on

Aboriginal rights have been given more definite content in a 1989 Convention on Indigenous and Tribal Peoples.³⁰ Although at first sight this treaty seems to be a more promising instrument for advancing cultural rights, it contains few absolute rules. Admittedly the Convention exhorts states to respect indigenous cultures and ways of living,³¹ but parties have no precise obligations.³²

With only limited support to be gained from treaties, indigenous peoples have resorted to a different strategy: that of linking their cause to human rights.³³ In 1981 the United Nations Commission on Human Rights established a Working Group on Indigenous Populations,³⁴ which since 1985 has been occupied with the drafting of a declaration of rights.³⁵ The declaration and a programme of action appeared in 1993 at the United Nations World Conference on Human Rights in Vienna.³⁶ It called on states to protect the rights of persons belonging to ethnic, religious and linguistic minorities and indigenous populations.³⁷

Although continued lobbying is leading to growing support for new international norms, aboriginal claims to culture are far from being completely formulated as binding

account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their social, economic, cultural and political institutions'. Article 1(2) provides that '[s]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion' for determining the groups to which the provisions of the Convention apply.

³⁰Convention No 169 (sponsored by the ILO). For the lead-up to and commentary on the 1989 Convention see Swepston (1990) 5 *Law & Anthropology* 221. And see Hinz (1990) 5 *Law & Anthropology* 201 for preparatory documents. In 1957, under the auspices of the International Labour Organization, a convention was negotiated with the aim of protecting aboriginal rights: Convention No 107 on the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries. The Convention did not gain wide acceptance, however (it was ratified by only 27 countries), nor, because of its assimilationist purpose and patronizing attitude, did it attract much support from indigenous peoples. Article 36 of the 1989 Convention aims at revising the earlier treaty.

³¹Article 8(1) provides that: 'In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.'

³²The Convention does no more than fix general goals, leaving the appropriate methods for achieving them to the governments concerned.

³³In part at least, because human rights do not entail the troublesome political issue of sovereignty, which is part and parcel of self-determination. Brownlie in Crawford (n5) *Iff esp* 6 sees group rights as an internal application of the concept of self-determination.

³⁴See generally Sanders (1989) 11 *Human Rights Quarterly* 406. In the same year, the Declaration of San José, following a UNESCO Latin-American conference, condemned 'ethnocide' - the destruction of cultures that results when groups are unable to live and develop in their own way - as a violation of international law equivalent to genocide. The declaration is cited in Crawford (n5) 202-4.

³⁵In 1984 the World Council of Indigenous Peoples (a non-governmental federation of indigenous organizations) adopted a Declaration of Principles of Indigenous Rights (reproduced in Crawford (n5) 205-7), which prefigured the 1993 Declaration.

³⁶1993) 32 *ILM* 1661.

³⁷Paragraph 32 called for an international decade of the world's indigenous peoples, including action-oriented programmes and a permanent forum to be established in the United Nations.

rights and duties in international law. Most aboriginal communities have thus adopted another tactic: to work through their national systems of municipal law. Especially in certain former British colonies, they have had striking successes.³⁸

The general effect of colonization was to subject indigenous populations to the law of the conquering power as soon as a new territory was subdued. In the case of colonies deemed *terrae nullius*, no question of recognizing local law arose, for such territories had no sovereigns and thus no recognizable legal regimes.³⁹ Yet, even where colonies had been won by treaty of cession or conquest, recognition was an act of generosity by the colonizer,⁴⁰ and as such it could at any stage be restricted or withdrawn.⁴¹

Early in its career as a colonial power, however, Britain decided that the native laws of its colonies were to be recognized,⁴² provided, according to the decision in *Campbell v Hall*,⁴³ that these laws were suitably 'civilized'.⁴⁴ After the American Revolution this enlightened policy was taken over by the United States.⁴⁵ Because of this special dispensation, native Americans were initially exempt from the United States Constitution and could maintain their own cultural standards.⁴⁶

³⁸It is strategically inadvisable for minorities or aboriginal peoples to rely exclusively on rights under municipal law, however, since governments may always withdraw support for what amounts to a revocable gesture of goodwill rather than a binding obligation.

³⁹Australia is the classic example. When the country was formally annexed by the Crown in 1788, Aborigines were deemed not to be a sovereign people. The Crown was therefore entitled to ignore the existence of Aboriginal law and land rights: *Coe v Commonwealth* (1979) 53 ALJR 403 at 408. By and large African territories were not treated as *terrae nullius*: Bennett (1993) 9 SAJIR 448.

⁴⁰Leaving aside, for the moment, the doctrine of aboriginal title which arguably was not disturbed by colonial occupation. See Bennett *op cit* 446ff and below ch IX.

⁴¹As Lord Dunedin explained in *Vajesingji Joravarsingji v Secretary of State for India* (1924) LR 51 Ind App 357 at 360: 'Where a territory is acquired by a sovereign state for the first time that is an act of state ... Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing.'

⁴²*Calvin's Case* (1608) 7 Coke's Rep 1a; 77 ER 377.

⁴³(1774) 1 Cowper 204 at 209.

⁴⁴Cf *Omychund v Barker* (1744) Willes 538 (Ch); 26 ER 15 and *Freeman v Fairlie* (1828) 1 Moore Ind App 305 at 324-5; 18 ER 117 at 127-8. Accordingly, while the colonists remained subject to their own law, a native community's local law was also recognized and enforced. It was only in cases where the indigenous system was of European origin, such as in Quebec and the Cape, that the colonists' birthright of English law was disregarded.

⁴⁵In consequence, Native Americans never completely lost their pre-colonial autonomy; they are still regarded as having inherent powers of limited sovereignty, with control over their own laws and institutions: *US v Wheeler* 435 US 313 (1978) at 322.

⁴⁶*Talton v Mayes* 163 US 376 (1896). See Rusco (1989) 14 *Am Indian LR* 269. In 1968, however, a Congressional Indian Civil Rights Act was passed, laying down a statutory bill of rights that now binds all tribal governments. Codified at 25 USC 1301-41 (1988). The ten provisions of the Indian Bill of Rights are detailed in Pacheco (1991) 16 *Am Indian LR* 135 fn107.

Social and political developments in Australia, New Zealand and Canada were in many respects similar to those in the United States,⁴⁷ but unlike the United States no attempt was made to protect native systems of personal law. It is only within the last twenty years that public notice has been taken of the fact that native peoples have not been fully assimilated and that they are suffering serious economic and social discrimination. For their part, aboriginal minorities have begun to campaign for greater respect, at first by demanding return of their ancestral lands and later by claiming full recognition of their culture and law.⁴⁸ The reaction has been partially to restore indigenous populations to the status they had at the time of colonization.⁴⁹

Namibian peoples may draw on the authority of these legal developments, in part because Namibia was also subject (indirectly at least) to British colonial policies and in part because Namibian courts may be persuaded by developments in other common-law jurisdictions.

2 RECOGNITION OF CUSTOMARY LAW IN NAMIBIA

There is no indication that any part of Namibia was regarded as terra nullius when German colonial occupation took place. Although German law was introduced as the basic

⁴⁷Indigenous peoples soon became minorities in their own countries: settler culture was taken to be the norm; and the aboriginal population was encouraged to assimilate itself to this regime.

⁴⁸Recognition that often amounts to full autonomy. Governments have been less than willing to accept the proposition that indigenous peoples are inherently sovereign, for this would threaten the authority of the Crown in ways that land claims do not. See Foster (1992) 21 *Manitoba LJ* 345.

⁴⁹In Canada, s 35(1) of the 1982 Constitution provides that 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed', and s 25 specially exempts indigenous laws from the Canadian Charter of Rights. The Charter is not to be construed as derogating from 'any aboriginal, treaty or other rights and freedoms that pertain to the aboriginal peoples of Canada': Sanders (1983) 61 *Canadian Bar Rev* 314ff.

In Australia, where Aboriginal law was at first denied any form of recognition on the understanding that the continent was terra nullius, both houses of the federal Parliament formally acknowledged, in 1988, the dispossession suffered by Aboriginals and their fundamental right to self-determination. Cited by Crawford (1989) 63 *Australian LJ* 395-6. See too the Barunga Statement of 12 June 1988, cited by Crawford *op cit* 399-400 and 402-3. Four years later, this political volte-face was given judicial approval by the High Court in *Mabo v Queensland* (1992) 175 CLR 1.

In New Zealand in 1975, when the Treaty of Waitangi Act established an informal tribunal to inquire into Maori allegations that acts of the Crown had derogated from rights guaranteed at the date of colonization (ie rights under the Treaty of Waitangi). The tribunal could recommend to the Crown that action should be taken to remove the prejudice or to make compensation. See *Te Runanga o Muriwhenua v AG* (1990) 2 NZLR 641 at 651-2. A body of principles, echoing in many respects early American jurisprudence, such as aboriginal sovereignty and the state's duty of protection, was soon developed to guide the tribunal's decisions. See *New Zealand Maori Council v A-G* (1987) 6 NZ Admin R 353 at 370 and 404. Prompted by the decisions of this tribunal, legal pluralism is gradually being admitted into the New Zealand legal system: McHugh *The Maori Magna Carta* 131. See Russell (1990) 5 *Law & Anthropology* 66 for an exposition of the recognition of Maori law.

law of the land, various peoples were allowed to retain their courts and legal systems, which suggests that they were regarded as sovereign peoples.⁵⁰

When South Africa took control of Namibia, Roman-Dutch law replaced German law. The Administration of Justice Proclamation⁵¹ provided that 'all laws within the Protectorate in conflict therewith [Roman-Dutch law] shall, to the extent of such conflict and subject to the provisions of this section, be repealed'. No mention was made of Namibia's indigenous systems of customary law, but the broad terms of the Proclamation permitted an interpretation that customary law had been superseded by Roman-Dutch law.⁵²

Common sense dictated otherwise. *Kakujaha v Tribal Court of Okahitua*⁵³ held that 'common and statutory law exist side by side with native law and custom and the latter is not replaced by the former except for those instance where legislation specifically so provides ...'. What is more, the general British policy regarding colonization would imply that indigenous laws be preserved unless clearly 'uncivilized'.⁵⁴

Formal recognition of customary law followed in 1928, although only in the context of a new administrative scheme for the governance of the African population. The Native Administration Proclamation of 1928 gave courts of 'native commissioners' a discretion to apply customary law in law suits between Africans. In 1985 even this limited recognition was withdrawn.⁵⁵

The laws indigenous to Namibia have never been fully recognized, and at all times they were subject to a repugnancy proviso requiring conformity with public policy and natural justice.⁵⁶ This regime has resulted in serious injustice, such as the refusal to accord customary marriages the same recognition as civil/Christian marriages,⁵⁷ and the likelihood is ever-present that customary law may be ignored when it runs contrary to current social policy.⁵⁸

The principal reason why customary law has enjoyed such scant respect is because it was not conceived of as a right. It has been assumed that the state has absolute discretion in deciding whether and to what extent customary law should be

⁵⁰Germany entered into agreements with the Herero, Khoisan, Damara and Rehoboth Basters in this regard. See Bley *South West Africa under German Rule 1894-1914* (1971) 140; Duggal *Toward a New Legal System for Independent Namibia* 3.

⁵¹21 of 1919.

⁵²On the basis of this provision *Pack v Muundjua & others; Tjipetekera v Muundjua & others* 1989 (3) SA 556 (SWA) at 564 ruled that the customary law of theft had been overruled and replaced by Roman-Dutch law.

⁵³20 March 1989 (unreported), per Strydom J at 2.

⁵⁴According to the decision in *Campbell v Hall* (1774) 1 Cowper 204. In other words, customary law would not be retained if it were incompatible with the repugnancy proviso.

⁵⁵By s 5 of the Native Administration Amendment Act 27 of 1985.

⁵⁶See above ch II.

⁵⁷See below ch VIII.

⁵⁸Or judicial perceptions, as in *Pack v Muundjua & others; Tjipetekera v Muundjua & others* 1989 (3) SA 556 (SWA).

recognized - an attitude that smacks of apartheid and colonialism.⁵⁹ When Africans were subject to the vagaries of an all-powerful state, application of customary law was merely a revocable permission that they might, within certain statutorily defined limits (mainly marriage, family, succession and land tenure) organize their lives according to African cultural norms.

Article 66 of the Constitution recognized customary law (on the same terms as Roman-Dutch common law) as part of the Namibian legal system.

'Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.'

This article simply preserved a status quo; it did nothing to change the position of customary law in the Namibian legal system. Thus Africans still have a precarious freedom to use customary law in their domestic relations.⁶⁰

3 ARTICLE 19 OF THE CONSTITUTION

(a) A right to recognition and application of customary law

Article 19 of the Constitution provides the rudiments of a new approach to customary law. It provides that:

'Every person shall be entitled to enjoy, practise, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this Article do not impinge upon the rights of others or the national interest.'

On the basis of these provisions, supplemented with the authority of international and foreign law,⁶¹ an argument can be made that the state is now obliged to recognize and apply customary law in all its courts.

The obstacles that this argument will encounter are the ambiguity and the narrowness of art 19. In the first place, culture is a notoriously indeterminate word.⁶² It could be read to include systems of personal law or it could refer only to the non-legal aspects of social life.⁶³ In common parlance (of English at least), 'culture' implies high

⁵⁹Hence, recognition of customary law has by and large been governed by the politics of expediency: because of shortages of finance and personnel, the state was in no position to impose an alien system of justice on the entire population: Allott *New Essays in African Law* 12-13.

⁶⁰See Bennett *Application* 40ff.

⁶¹This article is a classic example of rights 'framed in a broad and ample style [that] are international in character. In their interpretation they call for the application of international human rights norms.' *Minister of Defence, Namibia v Mwandighi* 1992 (2) SA 355 (NmSC) at 362. See further, Namibia's obligations under art 17(3) of the African Charter.

⁶²For a definition, see Kaplan & Manners *Culture Theory* 2-4. For the etymology of the word 'culture' in English and other European languages, see Williams *Keywords* 87ff. and for use of the concept in South Africa see Thornton in Boonzaier & Sharp *South African Keywords* 17-24.

⁶³See Berat & Gordon (1991) 24 *Vanderbilt J Trans L* 644. See, too, Kaganas & Murray (1994) 21 *J Law & Society* 412.

intellectual or artistic endeavour. A 'right to culture' in this sense can be juridically construed to mean the freedom - akin to a freedom of expression - to perform or practise the arts and sciences.⁶⁴ 'Culture' may equally denote a people's entire store of knowledge and artefacts,⁶⁵ especially the language, systems of belief and law that give a social group its unique character. This meaning would encompass a right to customary law, for customary law is peculiarly African (in contrast with law of a European origin).⁶⁶

In the second place, art 19 is on the face of it narrow. The provision gives no explicit right to insist that customary law be applied in legal proceedings. It states only that individuals are entitled 'to practise ... maintain and promote' the culture and traditions of their choice.⁶⁷ The state, as the direct duty-bearer under art 19,⁶⁸ has two obligations: not to interfere with the individual's right and to permit the existence of institutions necessary to sustain the culture concerned.⁶⁹

In the third place, art 19 explicitly entitles only individuals, not cultural groups. Arguably, however, the individual right *entails* a group right. From the beginning of human rights law, it was evident that the humanitarian purpose of protecting individuals inured to the benefit of groups.⁷⁰ Group and individual rights are therefore symbiotic partners, for the individual right to pursue a culture of choice presupposes the existence of a cultural community, and, if individual rights are to have any substance, this community must first be secure. Accordingly, it can be argued that a person's right to

⁶⁴By implication the purpose of the right is to enrich an intellectual tradition and to safeguard 'the rights of consumers of cultural, artistic, and scientific creativity': Sieghart *The International Law of Human Rights* 339 para 23.5.3.

⁶⁵And the processes of transmitting this store to future generations, whereby culture reveals its close ties with tradition, an affiliation that has at least one significant implication: unlike race, culture has nothing to do with biological heredity. See Capotorti (n14) para 222 p37 citing a 1951 UNESCO publication in this regard.

⁶⁶See Kaganas & Murray (n63) 412 and Bennett *Application* 7, 74 and 109.

⁶⁷Many human rights instruments, for example, art 13 of the American Declaration and art 17(2) of the African Charter, make provision for cultural rights in this sense. Article 22 of the African Charter, however, also protects a third-generation, group right to culture.

As Berker JP in *Ex parte Cabinet for the Interim Government of SWA: in re Advisory Opinion in terms of s 19(2) of Proc R101 of 1985 (RSA)* 1988 (2) SA 832 (SWA) at 841 and 866, made clear, however, the individual has free choice in making the decision. A law subjecting the individual to an ethnic group would be in conflict with this type of right.

⁶⁸If horizontal application of art 19 is permitted (on the question of which, see below ch IV), the duty-bearer could also be a cultural group.

⁶⁹Thus Naldi *Constitutional Rights in Namibia* 96 says that: 'It would seem that the State must take legislative and administrative measures to ensure the fulfilment of these rights [to culture].'

⁷⁰Thornberry (n2) ch 2. Hence, Simeon in Cassidy *Aboriginal Self-Determination* 103, says: 'it is by virtue of our membership in a larger community, and through the protection of its institutions, that we have rights at all. Community is implicit in rights. Conversely, the only justification for community is that its strength and vitality is essential to the well-being, indeed the rights, of each of its members.' The right to self-determination, in particular, is a condition precedent to the full realization of all human rights, because the question whether individual rights can be protected from abuse by a government depends, in the final analysis, upon who governs: McCorquodale (n17) 5.

have customary law applied to a dispute rests on membership of a group, which has a prior claim that the state recognize and enforce its law.

(b) Customary law as a right rather than a freedom

A further implication of art 19 of the Constitution is the conversion of what was previously merely a freedom to organize one's life according to customary law into a right. As the court in *Kauesa v Minister of Home Affairs & Others*⁷¹ noted, a unique feature of the Namibian Constitution is an explicit distinction between rights and freedoms. The right to culture is located outside art 21, which lists fundamental freedoms and subjects of them to the rights contained elsewhere in ch 3.

A freedom implies an absence of legal regulation, an area within which individuals may do as they wish.⁷² The freedoms typical of first-generation bills of rights (expression, belief, movement, association, etc), because they establish the primary conditions of community life, are generally taken to be historically prior to rights. Through the medium of court decisions and statutes, rights were then generated entitling individuals to infringe the freedoms of others. It follows that, in any hierarchy of norms, freedoms are always subordinate to rights, since a right authorizes the holder to demand that the duty-bearer does or does not do something that the duty-bearer was formerly at liberty to treat as a matter of personal choice.⁷³

The distinction between freedoms and rights lies in the generality of the former and the specificity of the latter.⁷⁴ Freedoms contemplate activities so diverse that the precise acts cannot be defined. Rights, on the other hand, stipulate definite conduct. Thus a freedom to pursue a culturally defined legal regime would comprehend the potentially infinite variety of activities that make up social life, whereas a right to customary law would oblige a court to apply that law in order to reach its decision.⁷⁵

Whether recognition and application of customary law is deemed a freedom or a right is not mere hair-splitting, since freedoms must consistently give way to the fundamental rights and the general law of Namibia. Subsection (2) of art 21 provides that:

⁷¹1995 (1) SA 51 (NmHC) at 66, citing *R v Zundel* (1987) 35 DLR (4th) 338 at 359-60.

⁷²The following analysis is taken from a series of Canadian cases: *Saumur v City of Quebec & A-G* [1953] 4 DLR 641 at 670; *Re Retail, Wholesale & Department Store Union, Locals 544 et al & Government of Saskatchewan et al* (1985) 19 DLR (4th) 609 at 615-19; *Re Cromer & BC Teachers' Federation* (1986) 29 DLR (4th) 641 at 649-50; and *Zundel's case supra* at 359-60.

⁷³The purpose of civil rights, especially those contained in delict and criminal law, is to protect individuals and the community from injuries that flow from the exercise of freedoms. See the Canadian decision, *Thomas v Norris* [1992] 2 CNLR 139 (BCSC), considered below ch VII.

⁷⁴In drawing this distinction, the Canadian cases cited above in footnote 72 have relied extensively on the McRuer Report on Civil Rights (*Royal Commission: Inquiry into Civil Rights* (1969)). An extract of the report is quoted at length in *Re Retail, Wholesale & Department Store Union, Locals 544 et al & Government of Saskatchewan et al* (1985) 19 DLR (4th) 609 at 616-18. Despite their generality, freedoms are restricted to specific types of activity, which suggests that what people are free to do must be delineated by reference to certain areas of behaviour.

⁷⁵Freedoms have no consequent duties, apart from a general obligation not to interfere with their exercise. Rights, by contrast, always imply corresponding duties.

*'The fundamental freedoms referred to in Sub-Article (1) hereof shall be exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of the rights and freedoms conferred by the said Sub-Article, which are necessary in a democratic society and are required in the interests of the sovereignty and integrity of Namibia, national security, public order, decency or morality....'*⁷⁶

On the basis of the 1985 Fundamental Rights and Objectives, for instance, the court in *Ex parte Cabinet for the Interim Government of SWA: in re Advisory Opinion in terms of s 19(2) of Proc R101 of 1985*⁷⁷ interpreted an ethnic group's right to maintain and promote culture⁷⁸ as a freedom, and hence subject to a right to equality.⁷⁹

If customary law is seen as a right, on the other hand, it will have juridical parity with the other fundamental rights. Any conflicts with the fundamental rights will then have to be resolved by the usual techniques of constitutional law, principally a balancing of interests.

By introducing a right to culture, art 19 does not necessarily nullify the previous freedom. Rather, practice of a culture must now be considered *both* a right and a freedom in a way that is analogous to the ownership of property: an owner is both free to use his or her property and has a right to vindicate it.⁸⁰ In consequence Africans may claim to be free to pursue their culturally defined legal regime within an area delimited by the rights of others,⁸¹ but at the same time they have a right to insist that the courts apply customary law in appropriate legal proceedings.⁸² The freedom comprehends the generality of social life, the right requires a specific act of recognition/application.

⁷⁶If, as seems reasonable, customary law is deemed part of 'the law of Namibia', it too may override the fundamental freedoms in the circumstances prescribed by subarticle (2).

⁷⁷1988 (2) SA 832 (SWA) at 855-6.

⁷⁸Contained in art 9.

⁷⁹Under art 3.

⁸⁰*Re Retail, Wholesale & Department Store Union, Locals 544 et al & Government of Saskatchewan et al* (1985) 19 DLR (4th) 609 at 616.

⁸¹With the corresponding claim to be free from interference.

⁸²Since the state is, in the first instance, the consequential duty-bearer.

IV APPLICATION OF CONSTITUTIONAL RIGHTS

1 CONFLICTS BETWEEN CUSTOMARY LAW AND THE FUNDAMENTAL RIGHTS

Once application of customary law is considered a constitutional right, not a precarious freedom, it is thrown into competition with the other rights contained in ch 3 of the Constitution. The result will be a series of conflicts, especially between the right to equal treatment and the many rules of customary law that subordinate the interests of women and children to senior males. The solution is not necessarily a ruling that customary law must be nullified, for conflicts between the rights in the Constitution must be dealt with in a balanced fashion, giving each right its due.¹

None the less, two provisions in the Constitution suggest that the fundamental rights should override any 'right to' customary law.² In the first place, art 66(1) states explicitly that customary law 'shall remain valid to the extent to which [it] ... does not conflict with this Constitution'. In the second place, art 19 provides that the entitlement to pursue a cultural tradition shall 'not impinge upon the rights of others'. If the entire catalogue of fundamental rights were to prevail over customary law, however, the consequence would be an end Namibia's indigenous legal systems. Surely this is not a result wanted by the Namibian people, especially those who live their lives according to customary law?

Any categorical denial of the validity of customary law is out of place in a country where the majority of the population is subject to that legal system. A more balanced approach would be to examine specific rules of customary law in light of three different techniques of constitutional litigation - horizontality, interpretation and limitation - all of which permit courts a measure of discretion in application of human rights.

2 HORIZONTALITY: APPLICATION OF HUMAN RIGHTS IN THE PRIVATE SPHERE

(a) Article 5 of the Constitution

In current jargon human rights were applied only 'vertically'. In other words, they could be invoked only by the individual against the state, for they were originally devised to protect citizens from arbitrary and oppressive government action. Human rights were not

¹*S v Van den Berg* 1995 (4) BCLR 479 (Nm) at 495.

²By contrast, the constitutions of other southern African states were careful to shield customary law from norms of equality/non-discrimination. Section 23(3)(b) of the Zimbabwe Constitution (Order 1600 of 1979) provides that the application of African customary law is not subject to the prohibition on discrimination contained in s 23(1)(a). A similar provision is contained in s 23(4)(d) of the Constitution of Zambia (Act 1 of 1991), s 15(4)(b) of the Swaziland Constitution (Independence Order 1377 of 1968), and s 15(4)(d) of the Botswana Constitution (Independence Order 1171 of 1966, as amended by Constitution (Amendment and Supplementary Provisions) Act 30 of 1969).

conceived to be 'horizontally applicable', ie a ground of action by citizens inter se. Hence, whether constitutional rights may override customary law, or conversely whether customary law may limit constitutional rights, depends on a positive answer being given to an antecedent question: does the Constitution regulate private relationships?³

The nature of a particular right and the words in which it is couched may give an immediate answer to this question. Certain rights are clearly not susceptible of enforcement against private individuals, because they were intended to be opposable against the state only. Under art 17(2) of the Constitution (which affords citizens a right to vote and to be elected to public office) and under art 15(1) (which gives children a right to nationality), for instance, the state is the only possible duty-bearer. Conversely, neither the nature nor the wording of art 10 of the Constitution (the right to equal treatment and non-discrimination) gives any clue as to whether the state or an individual should bear the corresponding duty. A difficult decision must thus be made whether the right applies to private persons.

Article 5 of the Constitution, which governs this issue, apparently gives the courts licence to apply constitutional norms in the private sphere:

'The fundamental rights and freedoms enshrined in this chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.'

This provision contains a significant restriction: fundamental rights must be upheld by all natural and legal persons but only *'where applicable to them'*. On the basis of this qualification, Namibian courts will be obliged to consider whether horizontal application is in all circumstances appropriate, and in this regard experience abroad indicates a distinct leaning towards applying human rights only vertically.⁴

Courts in the four countries considered below have broadly speaking confined constitutional norms to the relationships they were traditionally intended to protect: those between citizen and state. The reluctance to venture into horizontal application stems from the philosophy of the liberal state, which in turn requires a clear distinction to be maintained between public and private spheres of life. The state's authority extends only to the former, while, subject only to the regulation of private law, individuals are free to do as they please in the latter.

(b) The United States' doctrine of state action

In numerous decisions the American Supreme Court has held that government is not obliged to interfere in the lives of citizens to protect them from one another's acts.⁵ Thus it

³Put in different terms, can one individual bring a suit against another based solely on breach of one of the rights contained in ch 3 of the Constitution?

⁴Thus the High Court in *S v Sipula* 30 March 1994 (unreported decision No 39/94) at 7 and 9 considered that corporal punishment was not permissible only if imposed by organs of state. Cf *Ex parte A-G of Namibia, in re corporal punishment by Organs of State* 1991 (3) SA 76 (NmSC).

⁵In the famous nineteenth-century *Civil Rights Cases* 109 US 3 (1883), for example, the Supreme Court struck down an enactment seeking to compel innkeepers, owners of public conveyances, and places of amusement not to discriminate against members of the public on the ground that

has been unwilling to extend constitutional protections (in particular the Fourteenth Amendment which requires equal treatment and due process) to the acts of citizens *inter se*.⁶

Where the state itself was responsible for an act, however, no objection could be raised to invoking constitutional norms. In the late 1930s, the Supreme Court started to develop this idea under the rubric of a 'doctrine of state action'.⁷ Accordingly, if private persons undertook governmental functions⁸ or had close contacts with government,⁹ they were deemed to be bound by the same norms that bound the government. Similarly, if government had expressly or tacitly mandated an individual's activity, he or she would be obliged to uphold constitutional rights.¹⁰

The most extreme example of state action is the controversial case of *Shelley v Kraemer*.¹¹ Here state 'action' amounted to no more than implicitly sanctioning a private act. The case concerned a restrictive covenant in which white property owners had agreed not to sell their property to blacks. The Supreme Court held that as an organ of state it could not enforce the agreement:

'individual invasion of individual rights is not the subject matter of the [Fourteenth] Amendment' (at 11). Even in the more recent case, *DeShaney v Winnebago County Department of Social Services* 489 US 189 (1989), the Court held that the purpose of the Fourteenth Amendment was 'to protect the people from the State, not to ensure that the State protected them from each other'.

⁶Clapham *Human Rights in the Private Sphere* 157. Admittedly, the Supreme Court's reluctance is due in part to the wording of the Amendment (which was aimed explicitly at states in the federation), but until the introduction of the New Deal in the 1930s (see *West Coast Hotel v Parrish* 300 US 379 (1937)) the Court maintained a resolute stance on what it considered to be the proper role of government in civil affairs.

⁷Although whether this body of precedent deserves the title of a 'doctrine' is debatable, since its scope is anything but clear. See Nowak & Rotunda *Constitutional Law* 457ff. Cf Tribe *American Constitutional Law* ch 18.

⁸It is anything but obvious, however, whether a function is inherently governmental, since in the early twentieth century, states extended their activities into spheres formerly thought exclusively private, and conversely, since the 1970s, states have been divesting themselves of many of the responsibilities previously considered public. The Supreme Court tried to steer a safe course by restricting the scope of this category to activities that are traditionally associated with organs of state. Hence the operation of a public utility is not necessarily deemed a public function - *Jackson v Metropolitan Edison Co* 419 US 345 (1974) - whereas running elections - *Smith v Allwright* 321 US 649 (1944) - or managing public parks - *Evans v Newton* 382 US 296 (1966) - would be. See Nowak & Rotunda (n7) 461-2 citing *Jackson's* case *supra*.

⁹If the government had given aid or subsidies, or if the private party had a 'symbiotic relationship' or 'close nexus', the private party would be subject to Constitutional norms: *Burton v Wilmington Parking Authority* 365 US 715 (1961) and *Evans v Newton* 382 US 296 (1966).

¹⁰Government need have done no more than ratify an activity or merely encouraged it. Where public officials exceeded the scope of their authority, their acts were still subject to constitutional regulation, for they were acting under 'color of the law': *Home Tel & Tel Co v Los Angeles* 227 US 278 (1913) at 286-7; *Screws v US* 325 US 91 (1945).

¹¹334 US 1 (1947).

*'It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.'*¹²

Shelley's case has been read to mean that any judicial action is state action, an approach that is in line with art 5 of the Namibian Constitution (which expressly obliges the judiciary to uphold fundamental rights). If this interpretation is adopted, constitutional norms can be imported into all private relationships, for the courts might at any stage be called upon to enforce private agreements and juristic acts.¹³ Such an construction is too extreme, which is probably why American courts have not pursued *Shelley's* case further.¹⁴

In fact, the Supreme Court has never considered itself bound by any hard and fast rules when considering whether to apply constitutional rights to private actors.¹⁵ Instead, it has insisted on analyzing each case on its own merits, an approach that has entailed 'sifting facts and weighing circumstances'.¹⁶ The common denominators to emerge from this process have been a balancing of interests and a constant reference to considerations of reasonableness and necessity,¹⁷ principles signifying a close connection between horizontal application of basic rights and their limitation.¹⁸

¹²At 19.

¹³The law cannot be considered settled, however. *Kraemer's* case should be compared with *Flagg Brothers Inc v Brooks* 436 US 149 (1978), a case concerned with the sale of a debtor's goods by a warehouseman, who had a lien over them for unpaid storage fees. Although the sale was authorized by state law, which in turn was based on the Uniform Commercial Code, the Supreme Court held that it was a private matter, and therefore exempt from the Fourteenth Amendment. In *Reitman v Mulkey* 387 US 369 (1967), on the other hand, a state was prevented from amending its constitution to recognize a private property holder's right to dispose of property to whomever he or she chose on the ground that the amendment would 'encourage' private racial discrimination.

¹⁴*Shelley's* case could, for instance, prevent a court from giving effect to a will that distributed benefits according to racial distinctions: Wechsler (1959) 73 *Harvard LR* 29. Such a finding might not be objectionable, but if the precedent were taken to its logical conclusion, any discrimination that happened to be capricious or whimsical could be invalidated, because in terms of the Fourteenth Amendment courts would have to refuse to enforce 'unreasonable' distinctions: Henkin (1962) 110 *Univ Pennsylvania LR* 477. Thus Henkin *op cit* 475 argues that the court in *Kraemer* invaded 'the individual's freedom to be irrational which the amendment had never intended to eliminate, or even to deal with'. Cf the German attitude to such situations: Currie *The Constitution of the Federal Republic of Germany* 186.

¹⁵Clapham (n6) 158 and 163 therefore counsels against use of American precedents. Indeed, most commentators have despaired of finding a conclusive definition for state action, not to mention the Court itself: *Reitman v Mulkey* 387 US 369 (1967) at 378.

¹⁶*Burton v Wilmington Parking Authority* 365 US 715 (1961) at 722.

¹⁷Nowak & Rotunda (n7) 485.

(c) **Canada and the Dolphin Delivery case**

It was of no concern to the American Supreme Court whether the rules relied upon by private actors to justify their activities derived from legislation or the common law.¹⁹ Similarly, the Canadian Charter of Rights suggests that the provenance of a rule is irrelevant to the question whether a private relationship should be subject to constitutional norms.²⁰

In *Retail, Wholesale & Department Store Union Local 580 v Dolphin Delivery Ltd.*²¹ however, the Canadian Supreme Court held that although legislation is always subject to the Charter the common law is not affected unless the state is party to an action. The Court agreed that the Charter superseded all law, including the common law,²² but s 32(1) provided that the Charter of Rights applied only to the Parliament and 'government' of Canada, namely, the legislative and executive organs of state - significantly not to the judiciary.²³ The Court took this section to mean that the Charter would not override common law unless executive or legislative branches of government were in some way involved in an action.²⁴

Largely on the basis of s 32(1) of the Canadian Constitution, the *Dolphin* case introduced the source of a law as a critical factor in deciding whether to apply basic rights in the private sphere.²⁵ Article 5 of the Namibian Constitution, which declares that the judiciary is also subject to the fundamental rights and freedoms, circumvents the *Dolphin* case. This was a prudent decision, for the general feeling in Canada is that the Supreme Court was wrong to pose the origin of a rule as a criterion for applying

¹⁹Thus it has held that the constitutional freedom of speech overrides the common-law rules of defamation: *New York Times v Sullivan* 376 US 254 (1963) at 265. See Tribe (n7) 1711.

²⁰Section 52(1), which is similar in its import to art 66 of the Namibian Constitution, provides that: 'The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.'

²¹(1987) 33 DLR (4th) 174.

²²At 190.

²³McIntyre J held at 194 that the word 'government' here did not refer to all branches of government. Hence the Charter applied only to the legislature and executive in both public and private litigation. The difficult distinction that the American Supreme Court was forced to draw between the proper functions of government was thus avoided in Canada. The only issue was whether government had control: *Lavigne v Ontario Public Service Employees Union* (1991) 81 DLR (4th) 545.

²⁴As the court said at 195, the Charter 'will apply to the common law ... only in so far as the common law is the basis of some governmental action'. This decision was followed in *McKinney v University of Guelph* (1991) 76 DLR (4th) 545 at 635; *Douglas College v Douglas/Kwantlen Faculty Association* (1991) 77 DLR (4th) 94; *Lavigne's case supra* at 561-2. Cf the United States decision: *American Federation of Labour v Swing* 312 US 321 (1941).

²⁵Yet, at the same time that the *Dolphin* judgment was handed down, different decisions were reached in two other cases. In *Rahey v R* (1987) 39 DLR (4th) 481 a matter dealing with a criminal court's delay in trying an accused, the court simply applied the Charter, but without referring to *Dolphin*. In *British Columbia Government Employees' Union v A-G of British Columbia* (1989) 53 DLR (4th) 1 at 22 where the Charter was also applied, the court was forced to consider the decision in *Dolphin*, because the facts were remarkably similar. Both cases were concerned with a court order prohibiting picketing, but in *British Columbia* a court, as an organ of state, had issued the injunction at its own instance, whereas in *Dolphin* two private parties were concerned.

constitutional rights. To allow common law a prima facie exemption is to allow the application of human rights to hinge on technicalities.²⁶ In Canada (as in Namibia) it could be argued that all law is statutory, because common law was imported by way of a reception statute.²⁷

Technicality apart, it seems quite arbitrary to put common law in a privileged position vis-à-vis fundamental rights. Why should the courts be allowed to continue applying and developing the law in a way that systematically violates fundamental rights, while insisting that the legislature produce law in harmony with those rights?²⁸ Besides, if the courts are to remain true to the original conception of human rights - to protect citizens from state action - then surely the identity of the actors is the major issue, not the source of their authority?²⁹

(d) Germany and the doctrine of *Drittwirkung*

Two key issues in the Canadian debate on horizontality were irrelevant in the context of German law. The source of a rule was unimportant, because formally at least all law is codified, and the question whether the judiciary is obliged to apply fundamental rights was answered by art 1(3) of the *Grundgesetz*, which (like art 5 of the Namibian Constitution) provides that all organs of state are bound. Instead, German courts concentrated on the traditional civil-law division between public and private law.

As in the United States and Canada, it was accepted that the *Grundgesetz* should apply only in the public sphere. Nevertheless, during the 1950s, the Federal Labour Court held that, if private law were inadequate to protect individuals from the abuse of social power - and the 'wrongdoers' concerned (employers and trades unions) all wielded considerable social power - then constitutional safeguards had to be extended to the private sphere.³⁰ This uncompromising approach came to be called *unmittelbare Drittwirkung* (direct application) of fundamental rights.³¹

²⁶In Quebec, for example, all private law would be subject to the Charter simply because it is codified. *Tremblay v Daigle* (1989) 59 DLR (4th) 609 and (1990) 62 DLR (4th) 634 at 664, however, assumed that the Code should be treated in the same way as common law.

²⁷Id by the Administration of Justice Proc 21 of 1919. See Slattery (1987) 32 *McGill LJ* 905.

²⁸See *Dolphin Deliveries* supra at 198: 'Where, however, party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the Charter will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. That answer to this question must be in the affirmative.' See criticism by Beatty (1987) 37 *Univ Toronto LJ* 183ff.

²⁹See Hogg *Constitutional Law of Canada* 846-7. Slattery (1985) 63 *Canadian Bar Rev* 158 concludes that a uniform approach to horizontal application of the Charter is impossible, since much depends on particular rights and the circumstances of individual cases.

³⁰It was no accident that the main proponent of direct application, Nipperdey, was president of the Labour Court. See Gamillscheg (1964) 164 *Archiv für die Civilistische Praxis* 385.

³¹See Currie (n14) 182-3 and Lewan (1968) 17 *ICLQ* 583-4 for these decisions.

In the famous *Linh* decision,³² the Federal Constitutional Court called a halt to what was becoming runaway application of constitutional norms in private law. The Court deferred to the original conception of human rights - the need to protect citizens from the state - but at the same time decided that the Constitution had created an objective value system (*Wertordnung*) against which the application and interpretation of all law had to be measured. As to when the *Grundgesetz* should intrude into the private sphere, the Court held that the abstract and general nature of certain private-law rules offered obvious entry points, since no specific norms were available.³³ Both the courts and academic opinion in Germany have since come down firmly in favour of *mittelbare Drittwirkung* (indirect application of fundamental rights),³⁴ and the doctrine soon took root in Austria and Switzerland.³⁵

Willingness to extend the field of constitutional rights in Germany stems both from the *Sozialstaat* principle (that the modern state is obliged actively to promote the public good instead of remaining a passive bystander),³⁶ and from frank recognition of the fact that the state no longer holds a monopoly of power.³⁷ Hence it is felt that whenever existing legal institutions are incapable of protecting individuals from abuses of power the courts have a general responsibility to act.³⁸

(e) South Africa

While South Africa's Interim Constitution³⁹ contained no express provision on horizontality, several sections, notably 7(2) (which provided that the chapter on fundamental rights applies to 'all law in force'),⁴⁰ suggested that rights were to be horizontally applied.

³²*BVerfGE* 7 198 at 204ff. This and other decisions are cited in Lewan op cit 571ff esp 587-8. It was felt that, if no limitations were imposed, private law would be seriously destabilized, and that the state would have licence for unwarranted interference in private lives.

³³Typical *Generalklauseln* are those that declare a legal transaction void if *contra bonos mores* or those that require performance *nach Treu und Glauben*. The interpretation of such clauses entails reference to higher, more general norms, for which the Constitution is the obvious source: Pie-
roth & Schlink *Grundrechte Staatsrecht II* 51.

³⁴Dürig in *Festschrift für Hans Nawiasky* 158ff; Rübner in *Gedachtnisschrift für Wolfgang Mar-
tens* 215ff.

³⁵See Drzemczewski *European Human Rights Convention in Domestic Law* 200 fn 4. A similar doctrine has evolved in Japan: Horan (1976) 25 *ICLQ* 864ff.

³⁶Currie (n14) 20-4.

³⁷Formally private organizations, such as commercial corporations, trades unions, universities, and churches, wield considerable economic and social power, which private law may be ill-equipped to control.

³⁸Namely, to extend the rules of public law to protect all people under their jurisdiction. On these grounds, Drzemczewski (n35) 202-3 argues that municipal courts should also have reference to international human rights instruments in order to supplement domestic law.

³⁹200 of 1993. Section 8 of the 1996 Constitution, however, provides in subsection (1) that: 'The Bill of Rights applies to all law and binds the legislature, the executive, the judiciary, and all organs of state.' Subsection (2) (an echo of art 5 of Namibia's Constitution) provides that: 'A provision of the Bill of Rights binds natural and juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and of any duty imposed by the right.'

South African courts were nevertheless hesitant to come down in favour of a blanket ruling that the fundamental rights should be applied in the private sphere.⁴¹ Even in cases where horizontal application was allowed, various caveats were invoked. In one case,⁴² for example, the decision to apply the right to free expression in a private dispute was explained by the wider political and social significance of the parties' conflict. In another, the court was concerned to apply fundamental rights to institutions that were engaged in dealings with the public.⁴³ In general, the courts have inclined to a classic balancing of interests that reflects the American jurisprudence considered below.⁴⁴ Hence, one judge spoke of a need to 'strike a balance between ... the tensions of "under-" and "over-use"',⁴⁵ and another held that the principal issues to be considered were the nature and extent of a particular right, the values underlying it and the context in which a breach occurred.⁴⁶

(f) The public/private dichotomy

The courts' justification for their refusal to apply human rights to private relationships has been that constitutional norms should regulate activities in the public sphere only. The assumption that there is a natural dichotomy between public and private spheres of life has been exposed by the critical legal studies movement as not only false but also an obfuscation of underlying political values.

According to nineteenth-century liberal philosophy, the state had no obligation towards its citizens other than to refrain from interfering in their lives. In other words, individuals were believed to have (and were entitled to retain) a pre-political autonomy. Within this notionally private sphere, they were free to run their lives in whatever manner they wished.⁴⁷ As far as law was concerned, the public affairs were to be governed by the constitution and other rules of public law, while private relationships were regulated by a supposedly pre-state system of private law.

⁴⁰*De Klerk & another v Du Plessis & others* 1995 (2) SA 40 (T) at 42 and 51 held that this provision must be read in the context of s 7(1), which applies to the legislature and executive. Hence the reference to 'all law in force' means all public law applicable to the state and its organs. Cf *Motala & another v University of Natal* 1995 (3) BCLR 374 (D) at 381.

⁴¹While *De Klerk & another v Du Plessis & others* 1995 (2) SA 40 (T), *Gardener v Whitaker* 1995 (2) SA 672 (E) at 683 and *Kotze en Genis (Edms) Bpk v Potgieter* 1995 (3) BCLR 349 (C) came down in favour vertical application, *Mandela v Falati* 1995 (1) SA 251 (W) at 257 and 260, *Motala & another v University of Natal* 1995 (3) BCLR 374 (D) at 381-2 and *Baloro & others v University of Bophuthatswana & others* 1995 (4) SA 197 (BSC) at 238ff preferred horizontal application. See generally Lourens & Frantzen (1994) 27 *CILSA* 340ff.

⁴²*Mandela's case supra*.

⁴³*Baloro's case supra*.

⁴⁴See *Mandela's*, *Gardener's* and *Baloro's cases supra*.

⁴⁵*Baloro's case supra* at 238.

⁴⁶*Gardener's case supra* at 684. See, too, Clapham (n6) 178ff.

⁴⁷'Accordingly, the major function of a liberal charter is to police the boundary that separates the political and the collective from the pre-political and the individual - to contain the state so as to prevent it from intruding, in its utilitarian zeal, upon the "natural" realm of individual liberty.' Hutchinson & Petter (1988) 38 *Univ Toronto LJ* 284-5.

This regime was predicated upon a further assumption - that the state was supreme arbiter of power - and, while all citizens were subordinate to the state, their powers inter se were equal. Critical legal scholars, however, pointed to the enormous powers wielded by corporate entities; although of a private nature, these powers rival those of the state.⁴⁸ One of the major reasons for confining constitutional protections to the public sphere has thus been removed. Indeed, the consequences of continuing to insist that only the state is bound by basic rights become arbitrary. For instance, if corporal punishment is prohibited by a bill of rights, the rule would apply only to children in public schools but not to those in private schools, even though both institutions exercise equal powers.⁴⁹

Another assumption of liberalism is that the state was preceded by a 'pre-state' legal order regulated entirely by private law. This idea is now regarded as simplistic, if not wrong.⁵⁰ Institutions traditionally thought of as private, such as marriage⁵¹ and ownership of property,⁵² are in fact inextricably part of the public order. And today all rules of private law, whether they have their source in custom, precedent or statute, are endorsed and ultimately sanctioned by the state.

Finally, one of the main tenets of liberal thinking, the principle that the state has only negative duties, has been steadily eroded by changes in the nature of state functions.⁵³ The modern social welfare state endeavours to improve the lot of all citizens by restructuring society. This objective entails redistribution of wealth and an empowering of the disadvantaged, policies that obviously call for direct state action.⁵⁴

The argument against perpetuating the dichotomy between public and private spheres is highly persuasive. Any contention that customary law should be exempt from a bill of rights thus becomes difficult to sustain, for the claim must rest on a species of the division between public and private, namely, that there is an area of social life, marked by a cultural boundary and policed mainly by traditional leaders, within which constitutional norms may not intrude. In this reserved domain African culture will be free from state interference to continue developing in its own way. No doubt critical legal scholarship would negate the existence of a pre-state customary regime, deny any absolute cultural

⁴⁸See Clapham (n6) 137-8 and R fner (n34) 228.

⁴⁹Clapham (n6) 127-8. See, for instance, *McKinney v University of Guelph* (1991) 76 DLR (4th) 545 and *Stoffman v Vancouver General Hospital* (1991) 76 DLR (4th) 700. The former case concerned a public university and the latter a public hospital; both institutions were held to be exempt from the Canadian Charter of Rights because they were not run by the state.

⁵⁰See Cockrell 1993 *Acta Juridica* 227-34 for a review of this distinction.

⁵¹*Holland* 1973 (1) SA 897 (T) at 899.

⁵²Lewis (1992) 8 *S.A.J.I.R.* 407-8.

⁵³Evrigenis (1982) 3 *Human Rights LJ* 136-7 says: 'The growing complexity of the social fabric is obliging the State to take positive action to protect rights and freedoms which, in the traditional view, only required protection against interference by the public authorities. ... [The State] is not merely answerable for violations committed by itself but also, in a more general sense, for all violations committed within its territory.'

⁵⁴One of the results of confining social issues to the private sphere, is to suppress them. See Clapham (n6) 219 and Pateman in Benn & Gaus *Public and Private in Social Life* 282-7. See further Olsen (1983) 96 *Harvard LR* 1497ff.

dichotomy and expose such a division as the obfuscation of underlying political values, but each of these arguments can be met.⁵⁵

First, customary law is in fact a pre-state order, since in terms of the doctrine of aboriginal sovereignty⁵⁶ it is asserted by an indigenous people who can claim a sovereignty predating the imposition of colonial laws and western forms of constitution. Secondly, although there is no absolute difference between African and western cultures, there are still differences, and a state committed to tolerating cultural and legal pluralism is obliged to take account of them. Thirdly, no one would contest the political implications of asserting a cultural heritage: any claim to cultural self-determination is political.

(g) Customary law and *Drittwirkung*

If a local culture is to preserve at least some independence and identity, then the scope of constitutional norms must be limited.⁵⁷ Unrestricted application of a norm of equality, for instance, could soon reduce recognition of customary law to a token commitment. The problem is how to find a *modus vivendi* for culture under the new Constitution.

It would seem sensible in the circumstances to follow thinking in the jurisdictions considered above. Accordingly, the fundamental assumption must be that fundamental rights are to be applied only when the state is party to an action.⁵⁸ At the same time, note should be taken of the general dissatisfaction abroad with confining human rights to this context. No state can afford to abdicate its responsibility to protect its citizens and to improve their lot in life, a sentiment that would surely be shared in Namibia. Not only does the Constitution have abundant reference to a desire to eliminate all forms of discrimination,⁵⁹ but the state is also committed to a policy of affirmative action.⁶⁰ From these principles, the courts can take their mandate to extend human rights beyond the public sphere. The only question is how far they should go

⁵⁵Including concerns about the distribution of social power. The powerful corporations and similar bodies, that occasioned the extension of human rights to private relationships in other systems of law, obviously do not exist under customary law.

⁵⁶See below ch IX(1).

⁵⁷What German scholars feared would happen to private law, if the doctrine of *unmittelbare Drittwirkung* were not reined in, had precedent in the former South African Republic, where customary law was all but eliminated. The Transvaal government was prepared to recognize the laws and customs of the African population, provided they were compatible with 'general principles of civilization'. Because both polygyny and bridewalth were deemed incompatible (*R v Mboko* 1910 TPD 445 at 447 and *Kaba v Ntela* 1910 TPD 964 at 969, respectively) no customary marriages were recognized.

⁵⁸So far, this has been the approach in most of the South African decisions on the Interim Constitution. See *De Klerk & another v Du Plessis & others* 1994 (6) BCLR 124 (T) at 131-2 (interpreting s 7(2) of the South African Constitution), *Gardener v Whitaker* 1994 (5) BCLR 19 (E) at 29-30, *Motala & another v University of Natal* 1995 (3) BCLR 374 (D) at 381-2 and *Kotze en Genis (Edms) Bpk v Potgieter* 1995 (3) BCLR 349 (C). See generally Lourens & Frantzen (n41) 340ff. Cf *Mandela v Falati* 1995 (1) SA 251 (W).

⁵⁹Notably in the Preamble and art 23.

⁶⁰Under ch 11 containing Principles of State Policy.

American jurisprudence wisely rejects any sweeping answer to this question. The Supreme Court has insisted on weighing each right against the offending rule - a process of balancing interests⁶¹ - which suggests that application of constitutional norms must be determined by their social and legal circumstances.⁶² In this respect the doctrine of *mittelbare Drittwirkung* offers a useful guide as to what *legal* circumstances will be relevant.

In Germany fundamental rights become applicable where rules of private law are general and abstract in their formulation. Customary law is pervaded by generalized norms (usually characterized by a requirement for reasonable behaviour),⁶³ which provide a starting point for the introduction of fundamental rights. *Drittwirkung* can be extended further, however, to situations where private law has no applicable rule or where its rules are vague and contradictory. Here constitutional norms can be employed to fill 'gaps' in the law.⁶⁴

What might initially seem a limited basis for judicial review becomes, in the context of customary law, surprisingly broad. Customary law is poorly documented, many of the sources are out of date and probably no longer represent an authentic social praxis.⁶⁵ The Constitution provides a national system of values towards which all law should aspire. Hence, where the customary rule is not known, where the rule does not reflect social practice or where it is confused or ambiguous, the courts may invoke fundamental rights.⁶⁶

3 INTERPRETATION OF HUMAN RIGHTS

Unlike most other legal rights, human rights are of a high degree of abstraction, and, because they are so broadly conceived, interpretation becomes more important than it would usually be.

⁶¹In *Mandela v Valati* 1995 (1) SA 251 (W) at 257 and 260, for instance, the court adopted the classic balancing of interests approach (although without reference to the American state action doctrine). The right of free expression was applied in a private dispute, because one of the parties was a political figure and the dispute had social and political significance.

⁶²*Gardener v Whitaker* 1994 (5) BCLR 19 (E) at 31 thus held that the principal issue is the nature and extent of the particular right, the values underlying it and the context in which a breach occurs. See Clapham (n6) 178ff.

⁶³Customary law may not employ a precise formula, such as the reasonable man of the common law, but the concept obviously mediates many legal relations. See Gluckman *The Judicial Process among the Barotse of Northern Rhodesia* 82, regarding the concept of reasonableness in traditional courts, and Epstein (1972) 7 *Law & Soc R* 643.

⁶⁴Much the same approach was advocated in the Bangalore Principles 1988. See (1992) 2 *Victoria Univ Wellington LR* 5.

⁶⁵See above ch II(3)(a).

⁶⁶Judicial action need not be rushed or impromptu, since in many instances the groundwork for introducing human rights has already been laid. Through scholarly research and use of the repugnancy proviso elsewhere in southern Africa (for which see above ch II(2)(c)), various aspects of customary law have been identified as outmoded or contrary to human rights, and proposals for change have been made.

Traditionally, the art of statutory interpretation aimed at discovering and then giving effect to the intention of the legislator.⁶⁷ Such an approach made sense when Parliament was sovereign,⁶⁸ but the promulgation of a justiciable bill of rights has the effect of subordinating Parliament to the constitution.⁶⁹ A constitution is a "mirror reflecting the national soul", the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government'.⁷⁰ As a result, the courts are required to defer to the fundamental rights, the nation's supreme value system.⁷¹

What the drafters of the document intended is seldom of consequence.⁷² Remaining true to their purpose no doubt has the merit of eliminating a judge's personal preference from the process of interpretation,⁷³ but the doctrine of 'original intent' would shackle later generations to the attitudes and preoccupations of those who drew up the founding document.⁷⁴ In any case, it is seldom possible to extract a definite intent from the negotiations that preceded the drafting of the Namibian bill of rights, because the deliberations were secret and the drafts were not made public.⁷⁵

Interpretation of constitutions involves a difficult but unavoidable value judgment, an act of creation and imagination.⁷⁶ To reduce such a prodigious task to more manageable proportions, courts usually seek the authority of one of two principles. On the one hand, they refer to the need to give constitutional rights ample scope, so that individuals can obtain the fullest possible benefit.⁷⁷ It is said that constitutions, unlike statutes, must be construed generously, not restrictively or legalistically, in order to give full rein to the principles animating them.⁷⁸

⁶⁷Du Plessis (1993) 4 *Stellenbosch LR* 63ff.

⁶⁸*Matiso & Others v Commanding Officer, Port Elizabeth Prison, & Another* 1994 (4) SA 592 (SE) at 597.

⁶⁹Which has the inevitable effect of 'judicializing politics': Du Plessis (n67) 77.

⁷⁰*S v Acheson* 1991 (2) SA 805 (Nm) at 813.

⁷¹*ANC (Border Branch) & Another v Chairman, Council of State of the Republic of Ciskei, & Another* 1992 (4) SA 434 (CK) at 447, cited by *Matinkinca & Another v Council of State, Republic of Ciskei, & Another* 1994 (4) SA 472 (CK) at 481.

⁷²*De Klerk & another v Du Plessis & others* 1994 (6) BCLR 124 (T) at 129. Not all the provisions of a Constitution deal with high-minded issues of human rights, however. For more prosaic matters, such as the transitional arrangements, what was contemplated by the drafters may be relevant: *Kalla & Another v The Master & Others* 1995 (1) SA 261 (T) at 269.

⁷³And thereby prevents ad hoc amendments to a bill of rights without recourse to proper legislative procedures.

⁷⁴*Nyamakazi v President of Bophuthatswana* 1994 (1) BCLR 92 (B) at 118.

⁷⁵Diescho *The Namibian Constitution in Perspective* 30 and 32. See too *Hewlett v Minister of Finance & Another* 1982 (1) SA 490 (ZSC) at 497 and Marcus (1994) 10 *SAJHR* 98-9.

⁷⁶*Matiso & Others v Commanding Officer, Port Elizabeth Prison, & Another* 1994 (4) SA 592 (SE) at 597.

⁷⁷*S v Saib* 1994 (4) SA 554 (D) at 557.

⁷⁸An approach that has often been expressed in southern Africa: *S v Marwane* 1982 (3) SA 717 (A) at 748, *Minister of Defence, Namibia v Mwandighi* 1992 (2) SA 355 (NmSC) at 362-3, *Nyamakazi v President of Bophuthatswana* 1994 (1) BCLR 92 (B) at 117.

*'A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the "austerity of tabulated legalism" and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its peoples and in disciplining its Government.'*⁷⁹

On the other, courts refer to the purpose of a right, namely, what interests it is supposed to protect.⁸⁰

The 'generous' approach tends to broaden the ambit of a right, while the purposive (or teleological) approach tends to restrict it.⁸¹ How to decide which approach to adopt and how to deduce the purpose of a right may be discovered by adverting either to what American writers have dubbed 'political process theory' or to the overall structure and language of the constitution in question.⁸² Reference to current political process requires judges to favour whichever meaning of a right furthers the interests of a minority group which, because of malfunctions in the political process, was unable to protect itself.

Were such an approach to be adopted to the construction of ch 3 of the Namibian Constitution, customary law might well receive preferred treatment. The Constitution and the swift process leading to its acceptance reflected the concerns of a dominant western culture, one from which the guardians of the African heritage - the traditional rulers - were excluded.⁸³ But process theory - which is less a canon of construction than a justification drawn from the political milieu in which decisions are made - is open to a number of objections. The most telling is that it begs the question whether or not a minority should have been deprived of protection. After all, in a superficial sense at least, the democratic elections in Namibia indicated that the majority of the population was in favour of the Constitution produced by the Constituent Assembly.⁸⁴ The fact that the Constitution gives pride of place to western-style norms implies a clear political decision that minorities must simply accept.

⁷⁹*Government of the Republic of Namibia & Another v Cultura 2000 & Another 1994 (1) SA 407 (NmSC) at 418 and S v Van den Berg 1995 (4) BCLR 479 (Nm) at 495.* The sentiments expressed in this quote, in particular the need to avoid the 'austerity of tabulated legalism' (a quote from Lord Wilberforce in *Minister of Home Affairs (Bermuda) v Fisher & Another* [1980] AC 319 (PC) at 328), have been echoed in many other cases: *Ex parte Cabinet for the Interim Government of SWA: in re Advisory Opinion in terms of s 19(2) of Proc R101 of 1985 (RSA) 1988 (2) SA 832 (SWA) at 853.*

⁸⁰Which opens the inquiry into sources other than legal texts: *Nyamakazi v President of Bophuthatswana 1994 (1) BCLR 92 (B) at 118.*

⁸¹*Shabalala v A-G, Transvaal; Gumede v A-G, Transvaal 1995 (1) SA 608 (T) at 623-4; Phato v A-G, Eastern Cape & Another; Commissioner of the SAP Services v A-G, Eastern Cape & Others 1995 (1) SA 799 (E) at 810-11 and Nortje v Attorney-General, Cape 1995 (2) SA 460 (C) at 472.* Thus the two approaches should be distinguished: Davis (1994) 10 SAJHR 117-19. Cf the Canadian decision *R v Sparrow* (1990) 70 DLR (4th) 385 at 411-12.

⁸²See Woolman (1994) 10 SAJHR 79-81.

⁸³This was the type of argument presented by the Court in *S v Sipula* 30 March 1994 (unreported decision No 39/94) at 16. Three South African lawyers, none with any particular expertise in customary law, dominated the drafting of the Constitution: Diescho (n75) 31.

⁸⁴See Woolman (n82) 80-1.

A politically neutral approach to constitutional interpretation, and one that is generally preferred, is to deduce the meaning and purpose of specific terms from other parts of the enactment.⁸⁵ The Canadian decision, *R v Big M Drug Mart Ltd*,⁸⁶ has often been quoted in this regard. Here the court held that in order to discover the purpose of a fundamental right it was necessary to look to

'the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter'.

If a right to culture/customary law is to be read in the context of the Constitution as a whole, and if ch 3 rights are to be construed so as to give effect to underlying constitutional principles, there can be little doubt that customary law will be the loser.⁸⁷ Even so, constitutional interpretation is never deaf to the social milieu in which rights are to be applied, and, in this respect, the circumstances of Namibia will be of particular importance in securing respect for customary law.⁸⁸

International and foreign law may also be pertinent to constitutional interpretation.⁸⁹ Where a local instrument is vague or ambiguous, a obvious way of discovering a more precise meaning is to refer to the construction of a like term in the domestic law of other countries or in international tribunals. Here, the developing norms of international law concerning culture and aboriginal rights will be relevant to Namibia.⁹⁰

4 THE LIMITATION CLAUSE

(a) Article 22: techniques of limitation

As experience elsewhere has shown, human rights 'must be counter-balanced against the interests and welfare of the community, represented by the State'.⁹¹ In Namibia the main formal device for accommodating human rights to local circumstances is art 22 of the Constitution.

⁸⁵*Matiso & Others v Commanding Officer, Port Elizabeth Prison, & Another* 1994 (4) SA 592 (SE) at 597 and *Qozeleni v Minister of Law & Order & Another* 1994 (3) SA 625 (E) at 633-4. As *S v Ntesang* 1995 (4) BCLR 426 (Botswana) held, one section of a constitution cannot be interpreted in isolation from the others.

⁸⁶(1985) 18 DLR (4th) 321 at 359-60, cited by Marcus (n75) 94.

⁸⁷Article 66(1) alone makes it abundantly clear that customary law is subject to the Constitution.

⁸⁸See further below ch IV(4)(b).

⁸⁹See *Minister of Defence, Namibia v Mwandighi* 1992 (2) SA 355 (NmSC) at 362.

⁹⁰Culture was considered above ch III(1) and aboriginal rights below ch IX(1).

⁹¹The quote continues: 'In most legal systems, therefore, there is tension between the demand for clear, determinable, unqualified and explicit rules, and humanitarian and equitable principles that demand a degree of flexibility and pliancy.' *Nyamakazi v President of Bophuthatswana* 1994 (1) BCLR 92 (B) at 114.

'Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this chapter is authorised, any law providing for such limitation shall:

(a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;

(b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.'

The explicit requirements of art 22(a) are simple enough: a limiting law must be of general application, must not negate the essential content of a fundamental right and must not be aimed at a particular individual. (The 'essential content' requirement is unlikely to be an important issue,⁹² for even in Germany, the source of this rule, courts preferred a straightforward proportionality test.)⁹³ It is clear from these provisions, especially subart (b), that the article contemplates only legislation, since the offending rule must 'specify the ascertainable extent' of the limitation and must identify the constitutional provision giving authority to enact the limitation.

If the scope of art 22 is confined to legislation, customary law will fall outside its ambit, aside from odd cases where customary law has been encoded in a statute, such as the Traditional Authorities Act.⁹⁴ Accordingly, reference to techniques of limitation in other systems of law will be necessary to establish criteria for deciding how constitutional rights are to be adjusted to local conditions.

In the United States and Canada an elaborate jurisprudence has evolved on limitation. Because the American Constitution contained no express provisions allowing limitation of the Bill of Rights, the Supreme Court developed its own criteria.⁹⁵ Depending on the nature of the offending rule, one of three tests had to be passed. The lowest test, applicable to any enactment classifying the population into different economic groups (and thereby denying equal treatment),⁹⁶ required a 'rational' relationship between the classification and the purpose of the legislation.⁹⁷ Where classification was based on grounds of race or national origin, the Supreme Court invoked in addition a second, higher test, which required the government to show both that it was pursuing an end of 'compelling' or 'overriding' importance and that its classification was 'necessary' to achieve

⁹²And is unlikely to do so, for it appears that in practice the notion of 'essential content' has seldom played a decisive role in the German courts: Woolman (n82) 71-4; Jarass & Pieroth *Grundgesetz für die Bundesrepublik Deutschland* 336; and Currie (n14) 178 and 306. Cf *Nortje v Attorney-General, Cape* 1995 (2) SA 460 (C), where the court found that, because the essential content requirement had been infringed, the other requirements of the limitation clause did not need to be applied.

⁹³*S v Makwanyane & another* 1995 (6) BCLR 665 (CC) at 718-19.

⁹⁴17 of 1995.

⁹⁵An excellent summary of the law can be found in Nowak & Rotunda (n7) 568-76.

⁹⁶The seminal article on classification is by Tussman & tenBroek (1949) 37 *Calif LR* 341.

⁹⁷In effect, the Court has indicated that it is prepared to defer to the decision of the law-giver when determining the constitutionality of economic and welfare legislation. As Nowak & Rotunda (n7) 580ff say, although the requirement of rationality is easy to state, its meaning is far from clear.

the end in view.⁹⁸ Legislation classifying people according to gender or legitimacy,⁹⁹ however, had to demonstrate a 'substantial' relationship to an 'important' government interest.¹⁰⁰

Because of the complexity of American law, Canada decided to incorporate an express limitation clause into its bill of rights. The Charter of Rights thus opens with a provision that the rights within it are 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.¹⁰¹ In *R v Oakes*,¹⁰² the leading case on the limitation clause,¹⁰³ the Canadian Supreme Court held that interpretation of s 1 involved a two-stage inquiry.¹⁰⁴

In the first stage, the onus lay with the person seeking to impugn the validity of a law to prove that the law actually infringed a right or freedom guaranteed under the Charter. Two matters are involved, one an issue of evidence, the other of interpretation: that the law *as a matter of fact* conflicts with a constitutional right and that the applicant's interest or activity (for which protection is sought) falls within one of the rights guaranteed by the Charter.

Once the applicant had established these requirements, the onus shifted to the government to show that the aim of the offending law was 'of sufficient importance to warrant overriding a constitutionally protected right or freedom'.¹⁰⁵ In order to qualify as sufficiently important the aim had to 'relate to concerns which are pressing and substantial in a free and democratic society'.¹⁰⁶ Having proved the importance of the aim, government would then be obliged to show that the means chosen to achieve it were 'reasonable and demonstrably justified'. A proportionality test, consisting of three questions, was involved. Was the law 'rationally connected' to the aim it sought to achieve?¹⁰⁷ Did the means used impair the fundamental right 'as little as possible'?¹⁰⁸

⁹⁸Nowak & Rotunda (n7) 605ff.

⁹⁹Nowak & Rotunda (n7) 719ff.

¹⁰⁰Although this standard was not as difficult for the government to meet as the 'compelling interest' test, it was higher than a simple test of rationality.

¹⁰¹Section 1. See generally Hogg (n29) ch 35.

¹⁰²(1986) 26 DLR (4th) 200 at 227-8. See Woolman (n82) 63-4.

¹⁰³And one that has already been frequently quoted in South Africa. See, for instance, *S v Smith* 1994 (3) SA 887 (SE) at 897-8 and *Qozeleni v Minister of Law & Order & Another* 1994 (3) SA 625 (E) at 641 and *S v Zuma & others* 1995 (4) BCLR 401 (SA).

¹⁰⁴See Beatty (1992) 109 *SALJ* 411ff.

¹⁰⁵Citing here (at 227) *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 at 366: 'The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain [limitation clause] protection.'

¹⁰⁶Here the terms 'pressing' and 'substantial' echo the 'compelling/overriding' test used by the United States Supreme Court.

¹⁰⁷The test is a bare minimum which is designed to exclude laws that are 'arbitrary, unfair or based on irrational considerations': *Oakes's* case *supra* at 227. Legislation seldom fails on this basis: Woolman (n82) 64.

¹⁰⁸Woolman (n82) 65-6 says that the South African limitation clause was sensible to avoid this test, because it obliges the courts to deliberate whether another, less damaging means could have been chosen to accomplish the same aim - a task that the courts are not qualified to perform.

Were the effects of the measures adopted proportional to the objective sought to be achieved?¹⁰⁹

The *Oakes* formula has not been uncritically received. As interpreted by the courts, the onus placed on the applicant was especially heavy, while the onus on the state was relatively light.¹¹⁰ Besides, because so few laws have failed on this account, the requirement of a 'rational' connection between the law and its aim and the test of proportionality seems to be redundant.¹¹¹ Indeed, the battery of tests laid down in the *Oakes* case has proved too stringent to apply in matters of equal treatment.¹¹²

A major disadvantage of referring to American and Canadian materials on limitation is that they were concerned with legislation; the tests they applied have little relevance to customary law. For instance, it would be impossible to question the rational connection between a customary rule and its purpose without becoming involved in the notoriously inconclusive debate about the rationality of social institutions in terms of their manifest or latent functions. Similarly, it seems pointless to ask whether laws grounded on tradition fulfil a 'compelling', 'overriding' or 'pressing' social interest, since these laws have none of the overt purposefulness of legislation.

South Africa's Interim Constitution¹¹³ borrowed heavily from American precedent and the wording of limitation clauses in Canada and Germany and South African judges were quick to adopt the approach to limitation set by courts abroad. It seems that they were right to do so, since a certain logic determines the process of adjudicating limitation claims. Thus an initial presumption is that all law complies with the constitution.¹¹⁴ An onus then rests on the party alleging invalidity to prove both factual and legal contravention of a fundamental right. Inevitably, once the infringement has been established, the onus shifts to the party who seeks to uphold the offending law to prove that the fundamental rights may be justifiably limited.¹¹⁵

¹⁰⁹Which, it must be noted, has already been identified as 'sufficiently important'. This inquiry involves a straightforward cost-benefit analysis of the law: *Woolman* (n82) 64-5.

¹¹⁰*Beatty* (n104) 415ff.

¹¹¹*Hogg* (n29) 882-3 says that this is a duplication of the first stage of the inquiry, because an affirmative answer to the first question - does the law have a sufficiently important objective? - will inevitably yield an affirmative answer to the proportionality test. Nevertheless, the rational connection test has been invoked in several southern African decisions: *Cabinet for the Territory of SWA v Chikane* 1989 (1) SA 349 (A) at 364, *Mfolo & others v Minister of Education, Bophuthatswana* 1994 (1) BCLR 136 (B) at 139-41, *S v Zuma & others* 1995 (4) BCLR 401 (SA) at 414.

¹¹²*Andrews v Law Society of British Columbia* (1989) 56 DLR (4th) 1 at 26, for example, held that when legislatures have to classify groups to achieve social goals it is unreasonable to insist on the standards posed in *Oakes's* case. See *Hogg* (n29) 884 and *Phato v A-G, Eastern Cape & Another; Commissioner of the SAP Services v A-G, Eastern Cape & Others* 1995 (1) SA 799 (E) at 811-12.

¹¹³200 of 1993. Section 36(1) of the 1996 Constitution is in substance similar, but more straightforward, in that it abandoned the two tier test required under the Interim Constitution.

¹¹⁴A principle supported by art 25(1)(b) of the Constitution. See *Qozeleni v Minister of Law and Order & Another* 1994 (3) SA 625 (E) at 640; *S v Smith* 1994 (3) SA 887 (SE) at 897-8; *Khala v Minister of Safety & Security* 1994 (4) SA 218 (W) at 228; *S v Majavu* 1994 (4) SA 268 (Ck) at 315; *Kauesa v Minister of Home Affairs & Others* 1995 (1) SA 51 (NmHC) at 54.

¹¹⁵*Kauesa v Minister of Home Affairs & Others* 1995 (1) SA 51 (NmHC) at 54. *Jeeva v Receiver of Revenue, Port Elizabeth* 1995 (2) SA 433 (SE) at 453 held that: 'As a rule, this onus is not

The South African limitation clause adverts to criteria of reasonableness and justifiability - echoes of American case law - but so far neither have been given any precise definition.¹¹⁶ Instead, it has been held that reasonableness will depend on the facts of a given case and that justification entails a proportionality test, ie balancing the right in question against the limiting law in order to determine whether the limitation can be supported in an open and democratic society.¹¹⁷ The proportionality test, and the balancing of interests concerned, are the common denominators to emerge from foreign jurisprudence.¹¹⁸

In essence the question is how reasonable an offending rule appears in terms of 'the social conditions, experiences and perceptions of the people of [Namibia]'.¹¹⁹ Hence,

*'the one major and basic consideration in arriving at a decision involves an enquiry into the generally held norms, approaches, moral standards, aspirations and a host of other established beliefs of the people of Namibia.'*¹²⁰

Thus constitutionality had to be based

*'on a value judgment which cannot primarily be determined by legal rules and precedents, as helpful they may be, but must take full cognizance of the social conditions, experiences and perceptions of the people of this country.'*¹²¹

Once this avenue is opened,¹²² the courts will be given a field of reference outside the terms of the Constitution to matters that are social and political rather than legal.

easily discharged. The Courts are slow to hold that an erosion of a constitutional right is either reasonable or justified. But they will do so if the limitation serves an important objective which is in the interests of a democratically oriented society.' See too *Qozeleni v Minister of Law & Order & Another* 1994 (3) SA 625 (E) at 640; *S v Smith* 1994 (3) SA 887 (SE) at 897-7; *Khala v Minister of Safety & Security* 1994 (4) SA 218 (W) at 228; *S v Majavu* 1994 (4) SA 268 (Ck) at 315; *Park-Ross v Director for Serious Economic Offences* 1995 (2) SA 148 (C) at 162 and *S v Zuma & others* 1995 (4) BCLR 401 (SA).

¹¹⁶As the court in *Woods & Others v Minister of Justice, Legal and Parliamentary Affairs & Others* 1995 (1) SA 703 (ZSC) at 706 said: 'What is reasonably justifiable in a democratic society ... defies precise definition by the Courts. There is no legal yardstick, save that the quality of reasonableness of the provision under attack is to be adjudged on whether it arbitrarily or excessively invades the enjoyment of the guaranteed right'

¹¹⁷See *S v Majavu* 1994 (4) SA 268 (Ck) at 316-17 and *Matinkinca & Another v Council of State, Republic of Ciskei, & Another* 1994 (4) SA 472 (Ck) at 481ff.

¹¹⁸Both ideas have been eagerly adopted in southern African courts: *S v Makwanyane & another* 1995 (6) BCLR 665 (CC) at 708 and *S v Van den Berg* 1995 (4) BCLR 479 (Nm) at 521.

¹¹⁹*Ex parte A-G of Namibia: in re corporal punishment by Organs of State* 1991 (3) SA 76 (NmSC) at 96. As the court in *S v Shuma & Another* 1994 (4) SA 583 (E) at 591, said, the question of limitation cannot be assessed in an 'academic vacuum' but in the real context of criminal trials in general and the facts of the particular case. See further *S v Botha en Andere* 1994 (4) SA 799 (W) at 820 and 822.

¹²⁰*Ex parte Attorney-General, Namibia supra* at 95.

¹²¹*Ibid.* Cf *S v Zuma & others* 1995 (4) BCLR 401 (SA) at 412.

¹²²As Woolman (n82) 62 says: 'the limitation clause requires the Court both to determine the importance of the government interest in the restriction and to balance the petitioners' interest in exercising their fundamental freedoms against that government interest.'

(b) Social considerations

This being the case, courts will be required to weigh the merits of preserving African culture against values that are typically western, a confrontation between two cultural traditions that is reminiscent of the colonial encounter between European and African values in the nineteenth-century.¹²³ Contemporary courts have much to learn from their predecessors.

Family law is notoriously resistant to outside interference.¹²⁴ Case studies indicate that social reforms, particularly those designed to emancipate women from the bondage of patriarchy, failed to take effect where the intended beneficiaries had no 'access to independent means of subsistence after acquiring their freedom'.¹²⁵ And, where women were unable to litigate in state courts, they were incapable of enforcing their newly won rights.¹²⁶ In fact, far from embracing the well-intended interference of colonial legislators, the oppressed were usually content to continue living with the oppression that they knew and had learned to cope with.

A popularly accepted customary regime (as opposed to an official code) is one which by definition exists outside the formal law.¹²⁷ Legislation can be applied only by authorities under direct state supervision, and, in areas where the influence of the state is weak, parallel informal institutions will continue to flourish.¹²⁸ The relationship between formal codes and 'living' law is a topic of enduring interest to scholars concerned with law and anthropology.¹²⁹ Their findings have conclusively refuted the idea that 'law is ... the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions'.¹³⁰ Where a group is anxious to maintain its independence and identity, it will mobilize its cultural institutions as a first line of defence against intervention by the central state.¹³¹

¹²³A contest that was expressed in the repugnancy proviso. See above ch II(2)(c).

¹²⁴Bennett 1991 *Acta Juridica* 32. Allott *The Limits of Law* 196-202 considers resistance to legal/social changes generally.

¹²⁵Cheater (1989) 16 *Zambezia* 105.

¹²⁶On access to courts generally. see Bennett *Sourcebook* 87ff and 106ff.

¹²⁷For the distinction between the 'official' version of customary law and the 'living' law, see above ch II(3)(a).

¹²⁸The contributors to Morse & Woodman *Indigenous Law and the State* document the widespread dualism of this nature.

¹²⁹This dichotomy that refers back to Eugen Ehrlich's thesis in *Fundamental Principles of the Sociology of Law* (trans by W Molls) (1936) that law is derived from social practice rather than state authority. This body of research has come to be called 'legal pluralism'. See Griffiths (1986) 24 *J Legal Pluralism* 1ff, Merry (1988) 22 *Law & Soc R* 869ff and the collection of papers in Allott & Woodman *People's Law and State Law* and Morse & Woodman *op cit*. Recently, historical research with similar concerns has appeared: Mann & Roberts *Law in Colonial Africa*. See the critique of the folk law and legal pluralism movement by Tamanaha (1993) 20 *J Law & Society* 192ff.

¹³⁰Griffiths *op cit* 3.

¹³¹Hence, in the same way that people resist what they perceive as the impositions of a government that is uninvolved in their immediate lives, they will resist its reforms: Donnelly (1984) 6 *Human Rights Quarterly* 410.

Research into legal pluralism demonstrates the potency of customary law as a value system.¹³² Because customary law has long directed the way people conduct their lives, it will not be readily abandoned, especially by senior males, who stand to lose their positions of privilege and authority. Nevertheless, culture and law do not work as package deals, although the legal concern with logical coherence and system predisposes lawyers to think in that way. People are remarkably adept at operating within two or more normative systems: they pick and choose to suit the needs of the moment.¹³³

For the application of fundamental rights, this means that programmatic, gradual change is more likely to win long-term acceptance than a legal revolution decreed by the central state. To implement rights effectively, a thorough appreciation of the social settings in which rules apply is essential. To ignore context is to run the risk of the Constitution becoming paper law. It is also necessary to remember that for many people the Constitution is an alien transplant,¹³⁴ and without advance publicity, careful education and a serious attempt to make legal tribunals more accessible, people at whom the fundamental rights were aimed will be in no position to act on them.¹³⁵

¹³²Chanock (1989) 3 *Int J Law & Family* 74.

¹³³A point was made many years ago by Gluckman *Analysis of a Social Situation in Modern Zululand*. See further Van Doorne (1981) 21 *Cahiers d'Études Africaines* 479.

¹³⁴Becker & Hinz *Marriage and Customary Law in Namibia* 55 note, for instance, that, although civil marriages are the most common in Owambo, none of their informants was aware that only the High Court in Windhoek could pronounce a valid divorce.

¹³⁵Molokomme (1990-91) 30/31 *J Legal Pluralism* 303ff, for instance, calls for active dissemination of information and for legal aid.

V TRADITIONAL LEADERS

1 TRADITIONAL LEADERS AND THE CENTRAL STATE

(a) Traditional African governance

Traditional African forms of government diverged widely from the democratic mode that has come to be associated with modern western states. African rulers were not elected to office nor were their powers over their subjects precisely defined; the leader's authority was both diffuse and all-inclusive. (Hence the functions of African rulers were not separated into executive, judicial and legislative powers.)¹

At the apex of power and authority in an African polity was a chief.² In the eyes of his people he was the most important and the most powerful member of his nation.³ He embodied 'all the attitudes, emotions and values that ensure[d] its solidarity'.⁴ What today might seem an alarming concentration of power in one person, however, was tempered by the fact that traditional leaders were neither autocratic dictators nor faceless bureaucrats. They were the fathers of their nations and, like parents, they had to govern the nation wisely, care for the needy and judge disputes fairly.⁵

Normatively, a leader's rule was circumscribed only by a general duty to act for the benefit of his people. The more significant limitations on his power were imposed by practical politics.⁶ Most African polities were poised halfway between being state and

¹Hammond-Tooke *Command or Consensus: the development of Transkeian local government* 64-5; Mönnig *The Pedi* 253-4; Ashton *The Basuto* 209-10.

²See para 11.6.1 of the Kozonguizi Report *Commission of Inquiry into Matters relating to Chiefs, Headmen and Other Traditional or Tribal Leaders* for reasons why this term has been preferred to 'king'.

³Several subordinate officials, referred to as 'headmen' by colonial administrations, served under him. On the concept of the ward see: Holleman in Colson & Gluckman *Seven Tribes of Central Africa* 367-9; Schapera *Native Land Tenure in the Bechuanaland Protectorate* 27-32; Bourdillon *The Shona Peoples* 123-4; Jeppe *Die Ontwikkeling van Bestuursinstellings in die Westelike Bantoegebiede (Tswana-Tuisland)* 113 and Sheddick *Land Tenure in Basutoland* 8-9. Below the headmen came the patriarchal heads of households. Each incumbent of these three rungs of office exercised roughly the same powers but obviously at different levels of authority. Holleman in Colson & Gluckman op cit 371-2 and 376; Ashton (n1) 209; Gluckman *Politics, Law and Ritual in Tribal Society* 39.

⁴Hammond-Tooke *Bhaca Society* 174. Thus Owambo kings were the 'symbol of life' for their peoples: Williams *Precolonial Communities of Southwestern Africa* 99.

⁵Hunter *Reaction to Conquest* 392; Schapera *A Handbook of Tswana Law and Custom* 68; Hammond-Tooke (n1) 30; Mönnig (n1) 254. Consonant with his paternal image, a ruler's reputation would be enhanced by giving rather than receiving: Gluckman (n3) 50; Hammond-Tooke (n4) 199; Ashton (n1) 212; Mönnig (n1) 274; Breutz (1959) 5 *Bantu* 29.

⁶One of the reasons why it is so difficult to specify the scope of a traditional leader's authority is because there are few ethnographies on the subject. The first detailed anthropological account of traditional forms of African government was Schapera's *Government and Politics in Tribal Societies* (1956). Some twenty years later, further empirical studies on specific polities in South Africa began to appear: Hammond-Tooke *Command or Consensus* (1975); Prinsloo *Die Inheem-*

stateless societies,⁷ which meant that both centripetal and centrifugal forces were constantly at work.⁸ Whoever currently wielded power would invariably be challenged by rivals, who, in their turn, would gain power and consolidate their strength, but would eventually lose control to new competitors.⁹ These tensions explain why the African ruler's power was never in the past absolute.¹⁰ Anyone who attempted tyrannical rule would soon face revolt or secession.¹¹

It followed that the wise leader did not dictate to his subjects. He kept in touch with popular opinion through councillors who were his senior kinsmen or notable leaders in the community.¹² No important decision could be taken without prior consultation, and, because the councillors gave voice to popular views, they could check self-interested or capricious action.¹³ So a leader

se Administratiefreg van 'n Noord-Sothostam (1981); Prinsloo *Inheemse Publiekreg in Lebowa* (1983); Myburgh & Prinsloo *Indigenous Public Law in KwaNdebele* (1985); Myburgh *Die Inheemse Staat in Suider-Afrika* (1986).

⁷A dichotomy proposed by Fortes & Evans-Pritchard *African Political Systems* Introduction, especially 5ff. Cf Skalnik (1987) 25 & 26 *J Legal Pluralism* 301ff, however, who claims that the concept of state (which was formulated in Europe) does not help us to understand African polities.

⁸The former characteristic of centralized state societies and the latter of acephalous societies.

⁹Hall *The Changing Past* 63-4; Hammond-Tooke (n1) 31ff.

¹⁰Contrary to the views of colonial authorities, however, who regarded all indigenous rulers as autocrats. See the judgment in *Rathibe v Reid & Another* 1926 AD 74 at 81.

¹¹D'Engelbronner-Kolff 'The People as Lawmakers' paper delivered at a workshop on Traditional Authorities in the Nineties - Democratic Aspects of Traditional government in Southern Africa (1995) 12; Schapera *Government and Politics in Tribal Societies* 211; Hammond-Tooke (n1) 35-6; Ashton (n1) 217; Hunter (n5) 393-4.

¹²Of the councillors, Schapera (n5) 75 says: 'they do not belong to any formally constituted body, their number is not fixed or limited in any other way, and they are not formally appointed as official advisers.' The various types of council and general national gatherings are described in: Jeppe (n3) 126-7; Breutz (n5) 41-2; Ashton (n1) 216; Hughes *Land Tenure, Land Rights and Land Communities on Swazi National Land in Swaziland* 103-4; Myburgh & Prinsloo (n6) 11-13 and 51-3; Prinsloo (n6) *Publiekreg in Lebowa* 92-7; and Schapera *Tribal Innovators: Tswana Chiefs and Social Change* 22-5.

¹³Conversely, by acting through his council, the ruler could claim to be aloof from the petty politics of decision-making: Sansom in Hammond-Tooke *Bantu-speaking Peoples of Southern Africa* 267; Hammond-Tooke (n1) 67-8. See further: Kuckertz *Creating Order: the image of the homestead in Mpondo social life* 80ff; Jeppe (n3) 119ff; Hammond-Tooke (n4) 205-6; Prinsloo (n6) *Publiekreg in Lebowa* 153ff especially 165; Myburgh & Prinsloo (n6) 66ff; Ashton (n1) 215.

*'did not normally enjoy a continuing unquestioned right to command ... his authority had to be continually recreated situationally, in specific contexts. This is expressed in the formula that chiefs could not rule on their own, but only in constant consultation with their councillors and people.'*¹⁴

(b) Colonialism, apartheid and indirect rule

The various forces unleashed by conquest and capitalism soon undermined relationships between indigenous rulers and their subjects. Especially destructive of the old order was the restraint European powers imposed on movement by drawing international and regional boundaries across Africa. When people could not move freely,¹⁵ secession was no longer a viable option for disaffected factions and one of the most effective methods for countering unpopular rule disappeared.

The colonial policy of indirect rule had an even more pervasive, although less apparent effect on weakening the checks and balances that had moderated traditional rule.¹⁶ Once African rulers became functionaries of the new system of government, they had no need to look to their subjects for acceptance or approval. Their authority was supported by the full weight of the colonial state.¹⁷

The German colonial administration in South West Africa, unlike its British and French counterparts elsewhere in Africa, had no formal policy of indirect rule.¹⁸ It is true that in the northern part of the territory, external intervention was minimal. Here the existing indigenous leaders were employed as unofficial adjuncts of district administration,¹⁹ but this situation was less the result of considered policy than expediency.

When South West Africa fell under South African rule, the new administration began to implement policies that were being evolved in Pretoria. In 1923 the Administrator confirmed reserves created by the previous German regime in the southern part of the territory (ie outside Kaokoland and areas north of the so-called police zone).²⁰

¹⁴Hammond-Tooke (n1) 65 and in Thompson *African Societies in Southern Africa* 248. Comaroff (1974) 1 *J Southern African Studies* 41 puts it this way: 'the rights and duties of [a chief] are not immutably fixed: the chief and his subjects are thought to be involved in a perpetual transactional process in which the former discharges obligations and, in return, receives the accepted right to influence policy and command people. The degree to which his performance is evaluated as being satisfactory is held to determine the extent of his legitimacy, as expressed in the willingness of the Tshidi to execute his decisions.'

¹⁵Prinsloo (n6) *Publiekreg in Lebowa* 29.

¹⁶'Chiefs and headmen had to be kept strong enough to control their own people, but weak enough for the regime to control them.' Berat & Gordon (1991) 24 *Vanderbilt J Transnational L* 636.

¹⁷See Ashton (n1) 217 and Jeppe (n3) 149. One of the effects of divorcing rulers from popular support has been to erode the traditional ideal of consensual decision-making in favour of personal power and authority: Hammond-Tooke (n1) ch 8.

¹⁸Bley *South West Africa under German Rule 1894-1914* 140; Duggal *Toward a New Legal System for Independent Namibia* 3.

¹⁹Olivier *Inboorlingbeleid en -administrasie in de Mandaatgebied Suidwes-Afrika* 151. Similarly, when Germany took control of the Caprivi strip in 1909, the Fwe and Subia were allowed to retain their judicial and administrative systems. See Pretorius *The Fwe of the Eastern Caprivi Zipfel* 70.

²⁰Authority to do so flowed from s 16 of the Native Administration Proclamation 11 of 1922.

Under regulations issued the following year,²¹ these reserves were divided into wards, each of which was placed under the jurisdiction of a headman, who in turn ruled under the control of a 'superintendent'.²² Traditional leaders were deprived of various of their customary powers, notably, adjudicating criminal cases,²³ making allotments or depriving people of land²⁴ and granting permission to reside in the reserves.²⁵

In 1928 another Native Administration Proclamation²⁶ heralded a more considered South African policy. This enactment, like all others imposed on South West Africa, was a carbon copy of South Africa's legislation for its own African population. Hence, like South Africa's Native Administration Act of 1927,²⁷ the principal aim of the Proclamation was to create a new cadre of white officials under the Department of Native Affairs - the 'native commissioners' - to administer African affairs.²⁸

Although indirect rule was Pretoria's official domestic policy, South African authorities had no firm stance on South West Africa's traditional leaders. Under the 1928 Proclamation they had acquired no more than implicit recognition, and regulations promulgated in 1930 to specify their powers and duties merely confirmed regulations issued in 1924.²⁹ Traditional courts simply continued functioning without any statutory empowerment.³⁰ In the northern areas of the territory, rulers heard both civil and criminal suits, subject, of course, to the overriding authority of local commissioners (who headed an informal structure of appeals)³¹ This anomalous situation could persist only

²¹GN 68 of 1924 was issued in terms of s 20 of the Native Administration Proclamation 11 of 1922. The northern territories were again not affected.

²²Section 2 of the Regulations. 'Superintendents', as defined in s 36 of the Regulations, were generally officers appointed under s 4(5) of the Native Administration Proclamation 15 of 1928.

²³Section 9(a). These cases had to be reported to the superintendent. See *Ndisiro v Mbanderu Community Authority & others* 1986 (2) SA 532 (SWA) at 537.

²⁴Section 9(c).

²⁵Section 9(f). These regulations were amended by UGN 238 and 239 of 1930; Proclamation 24 of 1941; UGN 1564 of 1957; RGN 799 of 1962 and Proclamation AG 5 of 1977.

²⁶15 of 1928. See Gottschalk in Töttemeyer *Namibia in Perspective* 28-9 and Hinz *Customary Law in Namibia: Development and Perspective* 58.

²⁷No 38.

²⁸Section 4 of the Proclamation.

²⁹GN 60 of 1930.

³⁰Subject to a clear rule that they were not allowed to inflict the death penalty: Olivier (n19) 229-31 and 236.

³¹Olivier (n19) 236-8 describes the structure of traditional courts at Ukuanyama. Civil cases would in the first instance be heard by a sub-headman; an appeal could be lodged first to the headman, then to the council of headmen. Only the latter court had a criminal jurisdiction. Appeal against a decision of the council of headmen lay to an appeal court constituted by three headmen and the commissioner (who attended in an advisory capacity). See also *Wood et al v Ndongwa Stamowerheid et al* 1974 (3) SA 557 (SWA). According to Olivier (n19) 238, amongst other peoples of Owambo the commissioner himself heard appeals from councils of headmen. In the Kaokoveld a senior official and four headmen constituted the final court of appeal (Olivier (n19) 239), and in Kavango appeals from decisions of traditional courts (comprising the chief, *voormanne* and elders) lay to the commissioner (Olivier (n19) 239-40).

because few people were prepared to appeal against a chief's decision (and none against a commissioner's decision).³²

In 1967, when Proclamation R348³³ (another replica of South African legislation)³⁴ was promulgated, the indigenous court structure was at last officially recognized. The Proclamation empowered the Minister to confer on chiefs and headmen original and exclusive civil jurisdiction over cases between blacks³⁵ and criminal jurisdiction over customary crimes between blacks, apart from more serious crimes and those infringing the state's or a white person's rights.³⁶ Appeals lay to the commissioners' courts³⁷ and procedure was governed by customary law.³⁸

The South Africa policy of separate development³⁹ was introduced in 1968 by the Development of Self-government for Native Nations in South West Africa Affairs Act.⁴⁰ On the basis of the Odendaal Commission,⁴¹ six 'homelands' were identified in the territory: Damaraland, Hereroland, Kaokoland, Okavangoland, Eastern Caprivi, Ovamboland and 'such other area set apart for any native nation'. The Act contemplated the creation of separate legislative councils for each homeland, with competence to legislate over such matters as education and health.⁴² Traditional authorities were given extensive executive, legislative and judicial powers.⁴³

The situation was regularized to some extent in 1942 by an administrative decision that traditional courts should be entitled to hear any crime under customary law with the exception of murder, culpable homicide, treason or rape, again with the proviso that a death penalty could not be inflicted. See Olivier (n19) 231-2.

³²See Olivier (n19) 227, 240 and 244 and Gordon 1991 *Acta Juridica* 89-91.

³³And in Caprivi only in 1970 by Proc R320.

³⁴Namely, ss 12 and 20 of the Native Administration Act 38 of 1927. See Labuschagne 1974 *De Jure* 38ff.

³⁵Apart from issues arising out of civil or Christian marriages: s 2 of Proc R348 of 1967.

³⁶Section 3, as read with Schedule B to the Proclamation. The hierarchy of indigenous appeals also received statutory recognition under s 5 of Proc R348 of 1967 and s 2 of Proc R320 of 1970. If an appellant tribunal did not reach a decision within 90 days of the appeal, its jurisdiction lapsed, allowing an aggrieved party the right to appeal to a commissioner's court: s 5 of Proc R348 of 1967, as read with Proc R241 of 1973.

³⁷Section 3(5).

³⁸Section 3(2). Proclamation AG 8 of 1980 did not change the terms of recognition and application of customary law. See *Moraliswani v Mamili* 12 June 1985 SWA (unreported) and *Ndisiro v Mbanderu Community Authority & others* 1986 (2) 532 (SWA) 538.

³⁹As Werner in Töttemeyer (n26) 72-4 says, this policy maintained white control and gave the appearance of negotiation with the people of Namibia, but, because they were divided into ethnic units, they could not speak with one voice.

⁴⁰54 of 1968.

⁴¹*Report of the Commission of Enquiry into South West Africa Affairs 1962-1963* (1964) RP 12 81-111.

⁴²Section 3.

⁴³Sections 3, 5, 6, 7 and 8.

Thereafter, in Owambo (1968), Kavango (1970) and Caprivi (1972), specific traditional authorities were constituted by proclamation. In 1973 Owambo and Kavango became 'self-governing territories'. Rehoboth⁴⁴ and Caprivi followed suit in 1976. 'Advisory councils' were set up for the Dama in 1971, Herero in 1974 and Nama and Bushmen in 1976. In Owambo, Kavango and Caprivi, provision was made that chiefs were to continue enjoying 'the personal status [they have] hitherto enjoyed'.⁴⁵ Tribal authorities, village management boards and a council were created for the Nama, in which traditional leaders also featured.⁴⁶

In 1980 the Representative Authorities Proclamation⁴⁷ developed these state-like structures even further and extended them to all eleven of the officially recognized population groups in South West Africa.⁴⁸ The overall aim was to give each group its own legislative, executive and judicial powers. Justice was to be administered in accordance with the traditional laws observed by the tribes and communities in question.⁴⁹ This costly experiment soon disintegrated when, in 1988, the 1980 Proclamation was declared invalid for contravening fundamental human rights.⁵⁰

At Independence, Namibia inherited a muddled array of proclamations, regulations and ordinances (issued either by the South African administration or the 'representative authority' structures it had created) regulating the powers of traditional leaders. Article 147 of the Constitution⁵¹ repealed most of the enabling legislation on the basis of which these enactments were promulgated; but, to avoid a lacuna in the law, a strong argument can be made that some enactments, notably Proclamation R348 of 1967,⁵² survive.⁵³ The Traditional Authorities Act of 1995⁵⁴ makes no mention of these statutes and its provisions (which are in essence enabling) do not specifically overrule them. Accordingly, it can be presumed that past enactments are valid, unless in conflict with current legislation.

⁴⁴With a kaptein's and legislative council: Act 56 of 1976.

⁴⁵Section 29 of Proc R104 of 1973 (Ovamboland), s 30 of Proc R115 of 1973 (Kavango) and s 28 of Proc R42 of 1976 (Caprivi). Proclamation R150 of 1977 established a 'representative authority' for Damaraland. Separate 'community authorities' were established by Procs 177 and 178 of 1974 for the Mbanderu and Okamatapati.

⁴⁶Proclamation 160 of 1975.

⁴⁷AG 8 of 1980.

⁴⁸Namely, the Basters, Bushmen, Caprivians, Coloureds, Damara, Herero, Kavango, Nama, Owambo, Tswana and Whites.

⁴⁹Item 10 of the Schedule to the Act.

⁵⁰*Ex parte Cabinet for the Interim Government of SWA: in re Advisory Opinion in terms of s 19(2) of Proc R101 of 1985 (RSA) 1988 (2) SA 832 (SWA)*. It was also repealed under art 147 of the Constitution, as read with Schedule 8.

⁵¹As read with Schedule 8.

⁵²Hinz (n26) lists the other important laws to have survived the repeal: Owambo Civil and Criminal Jurisdiction of Chiefs Amendment Act 3 of 1974; Caprivi Jurisdiction of Chiefs Proc R320 of 1970; Damara Community and Regional Authorities Ord 2 of 1986; Tswana Chiefs and Headmen Ord 3 of 1986 and Establishment of a Nama Council Proc 160 of 1975.

⁵³Hinz (n26) 79ff.

⁵⁴No 17.

(c) **The modern 'traditional' ruler**

In all African countries the legitimacy of indigenous leaders, their efficiency and their efficacy obviously varies from individual to individual, and so too does the degree of control that the state exercises over them. Given a long history of association (and often collaboration) with colonial authorities, few independent African governments were well-disposed towards the chiefs and their subordinates.⁵⁵

In spite of these problems, in rural areas throughout Africa traditional rulers proved to be indispensable adjuncts of government,⁵⁶ in part because they continued to enjoy considerable popular support⁵⁷ and in part because they maintained an adaptable style of government that was more in touch with community sentiment than the central state. For ordinary people, their leaders were a 'legal and constitutional horizon', a 'personification of the moral and political order, protection against injustice, unseemly behavior, evil and calamity'.⁵⁸

African rulers have been (and still are) expected to play the difficult and quite contradictory roles of patriarchs and state bureaucrats. In consequence, there are serious discrepancies between the demands of government, what rulers actually do and the attitudes of local communities.⁵⁹ As far as contemporary practice has strayed from traditional norms, one might expect an adjustment in customary law to reflect the change: if former powers are no longer exercised, or if they are widely challenged, they should be deemed abrogated through disuse. Moreover, where customary law is in conflict with the norms of democratic government, it should be superseded by the Constitution.

The 1991 Kozonguizi Report⁶⁰ acknowledged the important role played by traditional leaders in local government. It recommended maintaining them as 'not only necessary but also viable ... within the context of the provisions of the Constitution of the Republic of Namibia and having regard to the integrity and oneness of the Namibian Nation as a priority'.⁶¹ The Traditional Authorities Act⁶² then implemented these recommendations.

⁵⁵See Van Nieuwaal Van Rouveroy (1987) 25 & 26 *J Legal Pluralism* 6-7.

⁵⁶See the overview by Van Nieuwaal van Rouveroy op cit 1ff esp 3. Even where deliberate attempts were made to depose or sideline traditional authorities, they continued to thrive. Adinkrah (1991) 24 *CILSA* 226ff, for instance, shows how successfully traditional rule survived decolonization in Swaziland.

⁵⁷Paragraphs 10.1.1 and 10.1.2.4 of the Kozonguizi Report (n2) found general backing for traditional rule, although many people in urban areas had lost connections with it. Support was often for the institution, however, rather than the individual office-holder: Comaroff (n14) 38 and Haines & Tapscott in Cross & Haines *Towards Freehold* 167-8.

⁵⁸Van Nieuwaal van Rouveroy (n55) 23.

⁵⁹See Weinrich *Chiefs and Councils in Rhodesia* for a detailed study and Miller (1968) 6 *J Mod Afr Studies* 183ff for a general analysis of role conflicts. See further: Kuckertz (n13) 74; Hammond-Tooke (n1) 212; Van Nieuwaal van Rouveroy (n55) 28.

⁶⁰*Commission of Inquiry into Matters relating to Chiefs, Headmen and Other Traditional or Tribal Leaders*.

⁶¹Paragraph 11.1.

⁶²17 of 1995.

The inclusion of traditional rulers in a constitutional order dedicated to democracy seems a conspicuous anomaly.⁶³ Yet it is an anomaly that is not equally manifest in all areas. The degree of difference between traditional and modern standards of government - and the significance of those differences - depends on which functions and which levels of government are involved.⁶⁴

2 LEGISLATIVE FUNCTIONS

Article 44 of the Constitution vests 'the legislative power of Namibia ... in the National Assembly'. The first question concerning traditional rulers is whether their power to legislate has been superseded and annulled by this provision.

Notwithstanding art 44, Parliament has the authority to delegate its legislative function - and it has done so by giving regional councils and local authorities the power to pass laws.⁶⁵ The Traditional Authorities Act is less explicit: it speaks only of a function to 'ascertain the customary law applicable ... and assist in its codification'.⁶⁶ None the less, the right to culture enshrined in art 19 and in art 66 (the provision recognizing the continued existence of customary law) suggests that a cultural community has an implicit right to maintain its cultural institutions. Since customary law cannot continue to exist without being maintained and developed, it may be argued that the traditional rulers' power to create new laws is not incompatible with the Constitution.⁶⁷

It would also seem that the essential content of the principle of democratic election is least infringed at the tertiary level of local government, the position allotted to traditional authorities. Law-making, especially in matters of custom, is not one of the principal functions of traditional leadership.⁶⁸ Undoubtedly, African rulers have always had unspecified powers to generate new norms for the community, but customary regimes tend to be more concerned with maintenance of the past than with restructuring the future.⁶⁹

In a democratic country such as Namibia, the law-making function implies at least periodic and popular election to the legislative organs of state. Offices in African political structures, however, are nearly always hereditary (and most systems of

⁶³See generally Motshabi & Volks 1991 *Acta Juridica* 104ff.

⁶⁴Sachs *Advancing Human Rights in South Africa* ch 8 esp 77-8, for example, argued that there is no inherent conflict between the traditional and democratic forms of government, provided that each operates in its own sphere.

⁶⁵Under arts 108 and 111, respectively, of the Constitution.

⁶⁶Section 10(1)(a) of the Act.

⁶⁷See D'Engelbronner-Kolff (n11) 5.

⁶⁸Cf, generally, Schapera *Tribal Legislation among the Tswana of the Bechuanaland Protectorate* and Prinsloo (n6) *Inheemse Publiekreg in Lebowa* 17ff. D'Engelbronner-Kolff (n11) 13 and Hinz (n26) 95-6 deal with legislation by traditional authorities in terms of the Namibian Constitution.

⁶⁹If tradition is the main basis of legitimacy for a legal system, the general principle holds true. See Hinz 'The "traditional" of traditional government. Traditional versus democracy-based legitimacy' paper delivered at a workshop on Traditional Authorities in the Nineties - Democratic Aspects of Traditional government in Southern Africa (1995) 13-15.

succession prescribe a rule of primogeniture in the agnatic line).⁷⁰ Although the reality of power politics might mean that customary rules of succession are manipulated or even ignored (and the death of a ruler often occasions fierce dispute),⁷¹ election was not a criterion for assuming office.

Under South African rule, traditional leaders were frequently appointed and removed at the discretion of the administration.⁷² The Traditional Authorities Act⁷³ reverses the dominant position of the state. It declares that every 'traditional community' is entitled to have a 'traditional authority'.

The concept of 'traditional community' bristles with problems. Colonial anthropology assumed that the tribe/chiefdom was the natural political structure of pre- (and indeed post-) conquest Africa and a tribe was supposed to be constituted by persons united by ties of kinship under the leadership of a senior member of the leading clan.⁷⁴ As a scientific term, the concept of tribe has been completely discredited for being both vague and deceptive. On the one hand, the criteria used to define tribe are so various - inter alia language, political affiliation, culture, genetic descent and common residence - that the concept has little value for analytical purposes.⁷⁵ On the other hand, colonial governments intervened so often to amalgamate, divide or constitute tribes (and to appoint tribal authorities) that current 'tribes' may bear little resemblance to a people's conception of their own group identity.⁷⁶

In a brave attempt to fix a notoriously vague concept, the Act defines 'traditional community' to mean:

*'an indigenous homogeneous, endogamous social grouping of persons comprising of families deriving from exogamous clans which share a common ancestry, language, cultural heritage, customs and traditions, recognises a common traditional authority and inhabits a common communal areas; and includes the members of that community residing outside the common communal area'.*⁷⁷

This definition is troublesome in at least two respects. First, the description of the communities entitled to have traditional forms of leadership as 'traditional' is ambiguous

⁷⁰See paras 9.1.1-2 of the Kozonguizi Report (n2) and further: Sansom in Hammond-Tooke (n13) 257; Schapera (n11) 50ff; Jeppe (n3) 113 quotes the Tswana adage: '*kgosi ke kgosi ka a tswetswe*' [a chief is a chief because he is born to it]. See too Myburgh & Prinsloo (n6) 5-8 and Prinsloo (n6) *Publiekreg in Lebowa* 113-14.

⁷¹See para 9.1.4 of the Kozonguizi Report (n2) and Gluckman (n3) 138ff.

⁷²Under the Native Administration Proclamation 15 of 1928. See *Moraliswani v Mamili* 12 June 1985 SWA (unreported) at 21.

⁷³17 of 1995.

⁷⁴Flowing from their genetic links, the people were assumed to share a common language, culture and law. Sansom in Hammond-Tooke (n13) 262-3. This assumption is questioned in light of historical and archaeological evidence to the contrary. See Hall (n9) 74ff.

⁷⁵Hammond-Tooke (n13) *Bantu-speaking Peoples* xv; Mafeje (1971) 9 *J Mod Afr Studies* 253; Gulliver *Tradition and Transition* 7-35 and Vail *Creation of Tribalism in Southern Africa*.

⁷⁶See generally Skalnik in Boonzaier & Sharp *South African Keywords* 68ff.

⁷⁷Section 1 of the Traditional Authorities Act.

(perhaps more so than the term 'indigenous', a word also used in the definition).⁷⁸ 'Tradition' is not a term of art in the law,⁷⁹ and it has no fixed meaning in common parlance such as might give it certainty in legislation. Secondly, the term 'endogamous', suggesting a preference for marriage within a social grouping, can hardly reflect the widespread social practice of recruiting new members from unrelated polities.

Members of a 'traditional community' may 'designate' one person from amongst themselves 'in accordance with the customary law of that community' as 'chief'.⁸⁰ 'Designate' is defined to mean a customary method for instituting a traditional leader.⁸¹ A chief's qualifications for holding office, removal and succession are similarly regulated by customary law.⁸² Under the Act chiefs are obliged in consultation with members of their communities to appoint a 'senior traditional councillor' and a specified number of 'traditional councillors'.⁸³ Again, qualification for office, tenure and removal are governed by customary law.⁸⁴

The state's role in the induction of new traditional authorities is reduced to the formality of taking note of their 'designation'. The Minister of Regional and Local Government and Housing must be notified and must attend the induction ceremony. Having determined that the rules of customary law were observed,⁸⁵ he or she must notify the President.⁸⁶ If the community concerned has no customary rules and procedures for designating traditional leaders or if the rules are uncertain or controversial, members of the community must elect the chief by majority vote.⁸⁷

Reliance on customary law contradicts several clauses of the Constitution. The preliminary question whether constitutional rights are applicable in these circumstances should be answered affirmatively. One ground for saying so would be that the traditional authorities are organs of state (notwithstanding a contrary opinion in *S v Sipula*).⁸⁸ Another would be that the social and political power wielded by traditional authorities

⁷⁸See Hinz (n69) 12.

⁷⁹See *President of the Republic of Bophuthatswana & another v Milsell Chrome Mines (Pty) Ltd & others* 1995 (3) BCLR 354 (B) at 367.

⁸⁰Section 3(1) of the Act. The Act reverted to the colonial style of naming leaders of African polities 'chiefs' regardless of their indigenous appellations, although under s 7 traditional titles may still be used: Hinz (n69) 15.

⁸¹Section 1 of the Act provides that 'designation' may include appointment, election or hereditary succession.

⁸²Section 3(2) of the Act.

⁸³Section 4(1) of the Act as read with the Schedule.

⁸⁴Section 4(2) of the Act.

⁸⁵Section 5(1) and (2) of the Act.

⁸⁶Section 6(1). Having received notice, the President is obliged to recognize the induction of the leader by notice in the Gazette.

⁸⁷Of all members above the age of 18 present at the meeting: s 5(4).

⁸⁸30 March 1994 (unreported decision No 39/94) at 10, which doubted whether they were principal organs of state in terms of arts 1(3) and 78-83 of the Constitution. The High Court further alluded (at 12) to the question whether traditional institutions had been formally recognized under Procs R348 of 1967 and R320 of 1970.

requires the imposition of constitutional restraints to protect their subjects. Accordingly, any issue concerning political office has implications not only for the interests of private individuals but also for society at large.⁸⁹

If the bill of rights is applicable in these circumstances, several conflicts may occur with customary law. First, in accordance with the general principle of democracy, art 17(2) allows every citizen over the age of 18 to vote and all those over 21 to run for public office.⁹⁰ Customary law, however, would restrict political offices to members of 'traditional communities'. This restriction also runs counter to the right of all citizens to participate in the culture of their choice, which would imply that they can insist on admission to any 'traditional community'⁹¹ and hence voting rights.

It should be appreciated, however, that none of the constitutional rights is absolute. Hence a cultural group may legitimately restrict admission to membership.⁹² In the *Lovelace* case,⁹³ for example, the International Human Rights Committee conceded that an enactment prohibiting Lovelace from residing on a reservation⁹⁴ constituted an interference with her right to enjoy an indigenous culture.⁹⁵ Nevertheless, the Committee held that laws could justifiably be passed to define access to a native community if they were reasonable and necessary to protect the community's resources and to preserve its identity.⁹⁶ On analogy, it could be argued in Namibia that 'traditional communities' may confine organs of self-government to their own members and may limit the admission of new members.

⁸⁹In the South African decision, *Mandela v Falati* 1995 (1) SA 251 (W) at 257 and 260, for instance, the political significance of free speech was deemed the main reason for allowing horizontal application.

⁹⁰Parliament may, however, override these rights 'on such grounds of public interest ... as are necessary in a democratic society'.

⁹¹Notwithstanding the restrictive definition of this concept in the Traditional Authorities Act.

⁹²Thus Lerner *Group Rights and Discrimination in International Law* 34-6, notes that under international law every group has a right to decide who may be admitted and how its identity may best be preserved.

⁹³Report of the Human Rights Committee, GAOR 36th Sess, Supp No 40 (A/36/40) Annex XVII 166; (1985) 68 ILR 17.

⁹⁴Because she had married a non-Indian, Sandra Lovelace lost her status as a registered Maliseet 'Indian' in terms of the Canadian Indian Act of 1951 (and thereby her right to live on a reserve and to benefit from government social welfare programmes) because she had married a non-Indian.

⁹⁵Lovelace claimed violation of her rights, inter alia, under art 27 of the International Covenant on Civil and Political Rights.

⁹⁶In other words, a balance had to be struck between the group's right to its identity and the individual's right to culture. *Lovelace's* case should be compared with the Australian decision, *Gerhardy v Brown* (1985) 159 CLR 70, and the *Belgian Linguistics Case* 1968 European Court of Human Rights Series A Vol 6 at 34. In the latter case, the European Court held that a state could validly discriminate amongst groups in the population, provided that it was pursuing a legitimate aim, the distinctions had an objective and reasonable justification, and there was a reasonable balance between the means employed and the aim to be realized.

Secondly, office is confined to members of ethnic groups, a rule that runs counter to the prohibition on discrimination on the ground of ethnic origin.⁹⁷ Article 22, the limitation clause, could again be invoked here on the ground that the Traditional Authorities Act does not negate the essential content of the norm of democracy, for, if an alternative, democratic structure of government is provided, the continued existence of non-democratic authorities would be permissible.

The alternative structures exist in the Regional Councils and Local Authorities Acts of 1992,⁹⁸ which provide for popular election to state established local authorities. Besides, any possible conflict between democratic and traditional forms of government is regulated by s 12 of the Traditional Authorities Act. Subsection (1) obliges traditional authorities to 'support' policies of central government and to 'refrain from any act which undermine[s] the authority of those institutions', and subsection (2) provides that in the event of conflict between a traditional and organs of the central government⁹⁹ the powers of the latter prevail.¹⁰⁰

Thirdly, art 10(2) of the Constitution provides that 'no persons may be discriminated against on the grounds of sex, race, colour, ethnic origin ... or social ... status'.¹⁰¹ Most offices in African systems, however, reserve political office to a ruling family, and, when the reigning incumbent dies, his successor is usually determined by rules of agnatic succession. Although not the norm in Namibia¹⁰² - for there is evidence, especially in Kavango but also in Owambo and amongst the Nama, to show that women have held political office - men are usually rulers.¹⁰³ Even if (as it is claimed in Kavango and Owambo) customary law has no explicit sexual barriers, very few women are in fact traditional rulers.¹⁰⁴ Because the Traditional Authorities Act does not disturb the

⁹⁷ Paragraph 6.1.1 and 6.1.2 of the Kozonguizi Report (n2) notes further conflict with the Preamble to the Constitution (requiring unity of the Namibian nation) and art 102(2) (requiring a strictly geographical delineation, without regard to race or ethnic origin, of the areas of regional and local authorities).

⁹⁸ Nos 22 and 23, respectively.

⁹⁹ Be they local authorities or regional councils.

¹⁰⁰ Hinz (n69) 18 indicates that, in any event, traditional authorities normally defer to central government.

¹⁰¹ And s 10(1)(g) of the Traditional Authorities Act requires affirmative action in respect of women.

¹⁰² In Caprivi and amongst the Herero, for instance, women were and still are excluded from office: Becker 'Gender Aspects of Traditional Authorities and Traditional Courts in a Democratic Society: Examples from Northern Namibia' paper delivered at a workshop on Traditional Authorities in the Nineties - Democratic Aspects of Traditional government in Southern Africa (1995) 8.

¹⁰³ Becker op cit 2-3 and 7. See Motshabi & Volks (n63) 105 fn4. In the strongly patrilineal societies of South Africa, women may at most act as regents if an heir is under age. See, for example, Ashton (n1) 197-8.

¹⁰⁴ Becker op cit 6.

customary rules governing qualifications for office, removal and succession, the Act may well be in conflict with art 10(2).¹⁰⁵

Two arguments, neither especially strong, may be made for limiting the prohibition on gender discrimination contained in art 10(2). First, if the prohibition were consistently applied, the office would no longer be 'traditional' in the sense contemplated by the Act and would conflict with the developing international norm of aboriginal sovereignty.¹⁰⁶ Secondly, inheritance of political office would not be the only aspect of status affected, since a change to the rules of succession would have a ripple effect on all the roles an individual is expected to play in society. The customary system is predicated on the transmission of all the deceased's responsibilities and assets to an heir, in particular the duty to support the deceased's dependants. Should women be allowed to succeed, they would be required to play the same roles as men, which would mean equipping them with the rights and powers that enable men to support families. Thus, any alteration to customary rules of succession will entail sweeping change to female status in general.¹⁰⁷

3 EXECUTIVE POWERS

In keeping with his position as head of the nation, an African ruler represents his people in all relations with outsiders¹⁰⁸ and provides a direct link to the shades of the founding fathers.¹⁰⁹ He has plenary executive powers, including rights to levy taxes,¹¹⁰ demand tribute from the harvest¹¹¹ or the hunt¹¹² and to choose the best land for his homesteads and fields.¹¹³

A vital power, one symbolic of the position of leadership, has always been a ruler's power to determine how land within his domain is to be used.¹¹⁴ In the past, when

¹⁰⁵There could be no constitutional objection to the principle of primogeniture, however. Hence, if a traditional leader were to die leaving both male and female descendants, only the rule preferring male descendants would constitute unlawful discrimination.

¹⁰⁶See the discussion of aboriginal rights below ch IX(1). Kerr (1994) 111 *SALJ* 727 points out that continued recognition of *traditional* authorities includes the mode of acquiring office. Thus, if the customary system of succession were abolished, these authorities would no longer be traditional.

¹⁰⁷Kerr op cit 728-9.

¹⁰⁸Schapera (n5) 69; Sansom in Hammond-Tooke (n13) 266.

¹⁰⁹See para 10.1.2.3 of the Kozonguizi Report (n2) and Bourdillon (n3) 87. In the latter role he presides over the nation's principal rituals, in particular those marking the agricultural cycle, a weighty responsibility entailing the obligation to ensure good rains and fertility of the crops.

¹¹⁰Especially to pay for public works: Ashton (n1) 208; Krige *The Social System of the Zulus* 221-2; Hughes (n12) 109.

¹¹¹Schapera (n3) 196; Letsoalo *Land Reform in South Africa* 19 and 23; Kuper *African Aristocracy* 150. Cf Marwick *The Swazi* 164 and Van Warmelo & Phophi *Venda Law* 1089.

¹¹²Holleman in Colson & Gluckman (n3) 378; Bourdillon (n3) 86; Hammond-Tooke (n4) 199; Ashton (n1) 208; Prinsloo (n6) *Publiekreg in Lebowa* 141; Krige (n110) 222.

¹¹³Schapera (n3) 44; Sheddick (n3) 147; Kuper (n111) 45 and 149. Today these traditional powers have expanded to include such matters as initiating agricultural development projects, licensing businesses and other incidents of modern local government.

¹¹⁴See *Moraliswani v Mamili* 12 June 1985 SWA (unreported) at 23.

a people arrived in a new area, their leader would decide on the location of his own homestead and fields, and in consultation with his councillors he would indicate where the main groups of his people were to settle. Within these areas, land was divided into separate zones devoted to grazing, residence and agriculture.¹¹⁵ Because most national lands have now been settled for many decades, the foundation of new realms and the zoning of land is no longer a material issue.¹¹⁶ Of greater day-to-day importance is the allotment of land to individuals and on occasion their removal.¹¹⁷

Administrative functions in a modern, democratic government are regulated by norms of fairness and accountability. Customary law had few rules catering for either principle, but then the personal style of traditional government did not require the strict controls necessary in a bureaucratic regime. The principal method for ensuring fairness was a rule that a leader had to consult his council before taking a decision; if the issue affected the entire nation, he had to consult a more representative national council.¹¹⁸ Consultation offered no more than an assurance that the issue was duly considered, however, and, while unanimity through persuasion was always an ideal in traditional government,¹¹⁹ a ruler would not be bound by his council's advice.

Similarly, customary law had few formal methods of bringing capricious or corrupt leaders to book.¹²⁰ To obtain the intercession of a third party complaints could be made to a leader's kinsman or to the council, but in extreme cases the only effective means of dealing with an incorrigible ruler would have been revolt or secession.

All a leader's customary powers have been confirmed in the Traditional Authorities Act. Although cast in terms of obligations, s 10(1) of the Act lists various traditional powers and ends with a blanket provision that allows traditional authorities to 'perform any other function as may be conferred upon their offices by law or custom'.¹²¹ A proviso to s 10 of the Traditional Authorities Act, contained in s 11, however, declares that:

¹¹⁵Schapera (n5) 196-7 and 208; Sheddick (n3) 9; Mönnig (n1) 153.

¹¹⁶See, for example, Jeppe *Bophuthatswana: land tenure and development* 22.

¹¹⁷Issues dealt with below ch IX(3)(c).

¹¹⁸Myburgh & Prinsloo (n6) 41-2 and 63-4; Prinsloo (n6) *Administratiefreg* 134-5 and (n6) *Publiekreg in Lebowa* 154; Hunter (n5) 394; Mönnig (n1) 284-5; Krige (n110) 219; Kuper *The Swazi* 36-8. He had to have an acceptable reason for his proposal, the merits of which would be debated in council. See, for example, *Kekane v Mokgoko* 1953 NAC 93 (NE).

¹¹⁹Jeppe (n3) 128; Hughes (n12) 105.

¹²⁰Cf s 8(1) and (2) of the Traditional Authorities Act, which applies customary law to the removal and replacement of traditional leaders.

¹²¹Section 10(1)(i).

(a) 'any custom, tradition, practice or usage which is discriminatory or which detracts from or violates the rights of any person as guaranteed by the Constitution or any other statutory law, or which prejudices the national interest, shall cease to apply;

(b) any customary law which is inconsistent with the provisions of the Constitution or any other statutory law, shall be invalid to the extent of inconsistency.¹²²

It follows that decision-making must be regulated by art 18 of the Constitution, which concerns administrative justice. This article provides that any person is entitled to demand that administrative officials act 'fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation'.¹²³ Thus traditional rulers are now bound by common-law standards of administration. This approach follows from the principle that decisions of any entity obliged to act in the public interest are subject to review. Traditional rulers should not be able to claim exemption from these requirements merely because their powers happen to derive from customary law; they are officials acting in the public interest, and, in so far as their decisions fall short of the requirements of authority, regularity, procedural fairness and reasonableness, they may be declared invalid.¹²⁴

Traditional rulers were also entitled to order their subjects to work on their lands and to provide labour for public works.¹²⁵ Although art 9(2) of the Constitution prohibits forced labour, the customary obligation might not constitute a contravention if it is read in light of art 9(3)(e), which permits 'any labour reasonably required as part of reasonable and normal communal or other civic obligations'.¹²⁶

4 JUDICIAL POWERS

(a) Jurisdiction

All traditional authorities had, by virtue of their office, the power to adjudicate any disputes brought before them. Proclamation R348 of 1967 gave the Minister a discretion

¹²²Horizontal application of the fundamental rights is not an issue in this respect, because traditional rulers act as agents of the state. See *Retail, Wholesale & Department Store Union Local 580 v Dolphin Delivery Ltd* (1987) 33 DLR (4th) 174.

¹²³The article continues: '... and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'

¹²⁴See further Bennett (1993) 110 *SALJ* 288ff and Unterhalter in Murray & O'Regan *No Place to Rest* 224.

¹²⁵*Myburgh & Prinsloo* (n6) 8; *Ashton* (n1) 207-8; *Hughes* (n12) 109; *Kuper* (n118) 144.

¹²⁶Article 95(e) of the Constitution also obliges Namibia to adhere to the international conventions and recommendations of the ILO. In this regard, the Forced Labour Convention No 29 of 1930 is relevant. Although states parties are obliged to suppress forced labour practices, exceptions are allowed, notably under arts 2, 7 and 10. Thus art 2(2)(e) allows 'minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations ...'. And under arts 7 and 10 traditional rulers may exact forced labour, provided the work is in the interests of the community, is necessary and not too burdensome and is in accord with the exigencies of social life and agriculture.

whether or not to constitute a ruler's tribunal the court of a 'chief or headman',¹²⁷ but this provision seems now to have been superseded by s 10(3)(b) of the Traditional Authorities Act which empowers a traditional authority: 'to hear and settle, subject to customary or statutory law, disputes over any customary matter between members of that traditional community'.¹²⁸

This section functions to determine both jurisdiction and choice of law. Disputes must be 'over any customary matter',¹²⁹ a suitably general term that avoids the former jurisdictional limitation that litigants be African by referring instead to a racially neutral criterion: breach of African customary law. Conflict with art 10 of the Constitution is not completely circumvented, however, since s 10(3)(b) could be argued to be an *indirect* method of discriminating on the ground of ethnic origin.

Even so, restricting the use of cultural institutions to members of that cultural group is common and it does not necessarily involve actionable discrimination. In *Gerhardy v Brown*,¹³⁰ for instance, the Australian High Court held that, although a local statute discriminated on grounds of race, it was still valid because it was a 'special measure' designed to secure the advancement of an ethnic group needing special protection to achieve equal enjoyment of human rights.¹³¹ The reservation of special courts for the use of a particular group is not so much a 'special measure'¹³² as a limitation on the right to equal treatment.¹³³ Traditional courts no doubt operate to the special benefit of those who for reasons of finance and education have no access to the higher courts of the land. In this sense, traditional courts are a special measure; but the main purpose for allowing only Africans to litigate here is to provide them with a forum in keeping with their cultural expectations.

Conversely, a litigant might argue that being forced to submit to the jurisdiction of a traditional court would entail being subject to a lower standard of justice and therefore discriminated against on the ground of ethnic origin or economic status.¹³⁴ Considerable differences do of course distinguish traditional courts from the other courts

¹²⁷ Section 2(1).

¹²⁸ The judicial powers of traditional authorities were clearly contemplated under art 78 of the Constitution, which provides that 'judicial power shall be vested in the Courts of Namibia, which shall consist of: ... Lower Courts' See Debates of the Constituent Assembly vol 1 (1990) 301-6.

¹²⁹ Which seems to contradict the provision that the dispute may be settled either by customary or statutory law.

¹³⁰ (1985) 159 CLR 70.

¹³¹ The sentiments underlying this decision are similar to those in *Ross-Spencer & Another NO v Master of the High Court* 1971 Swaziland LR 59 (HC) at 65 and the *Lovelace* case (Report of the Human Rights Committee, GAOR 36th Sess, Supp No 40 (A/36/40) Annex XVII, 166) (1985) 68 ILR 17. See, too, *Regents of the University of California v Bakke* 438 US 265 (1978) at 325, *Morton v Mancari* 417 US 535 (1974) and *US v Antelope* 430 US 641 (1977).

¹³² Implying affirmative action.

¹³³ And as such would qualify under art 22.

¹³⁴ This argument would be especially pertinent to criminal cases and to situations where a litigant has no choice of forum. Prospective plaintiffs are not compelled to pursue a case in traditional courts, since magistrates' courts are also available. Defendants and accused persons, on the other hand, generally have to follow the plaintiff's choice of forum.

of the land (the former may not, for example, apply the common law and they do not permit legal representation), but these differences are consonant with a particular cultural orientation. In every material respect, the African method of adjudication was the equal of, if not an improvement on, western-style courts.

It is impossible to say whether all traditional courts still achieve their high standards, for no empirical data is available. However, if it could be shown that they now dispense a standard of justice that is markedly inferior to other courts of the land, then the party who is prejudiced would be able to present a case of discrimination.

(b) Procedure

According to the West African jurist, Asante:

*'The notion of due process of law permeated indigenous law ... customary legal process was characterized not by unpredictable and harsh encroachments upon the individual by the sovereign, but by meticulous, if cumbersome, procedures for decision-making.'*¹³⁵

One can go as far as to say that the indigenous system of adjudication, at least in its ideal form, probably offered the individual a better guarantee of 'a fair and public hearing'¹³⁶ than a western court, for African tribunals sought a reconciliation of the parties approved by the community.¹³⁷ Yet in two instances customary procedures may fall short of new standards set by the Constitution.

The first is a problem more apparent than real. Article 12(1)(d) of the Constitution provides that accused persons are to be presumed innocent until proven guilty according to law.¹³⁸ It often used to be said that customary law presumed the guilt of anyone charged with committing an offence and that the accused then had to convince the court otherwise. Use of a technical common-law concept, such as a presumption of guilt, to describe the customary judicial process is, however, misleading. The term 'assumption' is more apt to denote an indigenous tribunal's attitude towards accused persons, for absolute presumptions of guilt or innocence would make no sense where the principal aim of a trial was to mediate or reconcile.¹³⁹

¹³⁵Asante (1969) 2 *Cornell Int LJ* 73-4. Admittedly, this statement does overlook the fact that due process was not always extended to outsiders: Marasinghe in Welch & Meltzer *Human Rights and Development in Africa* 33 and Mojekwu in Nelson & Green *International Human Rights* 87.

¹³⁶As required under art 12(1)(a) of the Constitution.

¹³⁷See the accounts by Gluckman *The Ideas in Barotse Jurisprudence* 7-11 and Holleman *Issues in African Law* 16-47. Because reconciliation required a slow but thorough examination of any grievance, litigants had every opportunity to voice their complaints in a sympathetic environment. By comparison, the highly professionalized western mode of dispute processing is calculated to alienate and confuse litigants. Ironically, this supposedly more advanced system of justice (which was introduced to Africa in the cause of 'civilization') is now working to the disadvantage of the bulk of the population.

¹³⁸See discussion of the principle in common law by Skeen (1993) 9 *SAJHR* 525.

¹³⁹Which was normally the case in African courts. Hence, according to Gluckman *The Judicial Process among the Barotse of Northern Rhodesia* 94-7 and (n137) ch 7, the presumption of guilt in customary law was misconceived.

Secondly, subart 12(1)(e) of the Constitution gives a right to be defended by a legal practitioner of the individual's choice.¹⁴⁰ This right cuts across the customary notion of due process, which had no institution of professional representation. All adult males were expected to know the law and the judicial procedures of their people; only women or juniors needed assistance to present their cases. It is probably true to say that customary law had no fixed rule one way or the other on representation.

The principal reason for engaging legal professionals is to benefit from their advice (not to mention their rhetorical skills) on how to pursue rights in a complex and, for the litigant, inaccessible legal system.¹⁴¹ Hence a policy of excluding lawyers from the traditional courts seems reasonable where civil claims and minor criminal offences are concerned, for we can assume that Africans are familiar with their own, more informal system.¹⁴² In serious matters that have far-reaching financial consequences, however, the exclusion of lawyers is less easy to defend. The traditional attitude to legal representation will have to be modified to take account of these cases.¹⁴³

Under Proclamation R348 of 1967, traditional courts were not permitted to impose any of the following punishments: death, mutilation, grievous bodily harm, imprisonment, a fine in excess of R40,¹⁴⁴ or, except for unmarried males below the age of 30 years, corporal punishment.¹⁴⁵ With one exception - the whippings that may be inflicted on juniors - these statutory limitations are in line with art 8(2)(b) of the Constitution, which prohibits 'cruel, inhuman or degrading treatment or punishment'. Whippings have generally been considered contrary to human rights norms, both in Namibia¹⁴⁶ and elsewhere in southern Africa.¹⁴⁷

The High Court in *S v Sipula*,¹⁴⁸ however, reviewed the conviction of a policeman who had inflicted corporal punishment in pursuance of a decision by a traditional court.

¹⁴⁰In common-law circles it was debated whether this should be regarded as a fundamental human right. In South Africa the Hoexter Commission *Final Report* vol 1 Part 2 para 6.4.1 noted that a state priding itself on a democratic way of life should not regard legal representation 'as a pure luxury or a fortuitous benefaction of the Government, but as an essential service'. But *S v Rudman; S v Mthwana* 1992 (1) SA 343 (A) held that representation was only an entitlement, not a right. See discussion by Cowling (1994) 57 *THRHR* 18.

¹⁴¹See the discussion of representation in *Yates v University of Bophuthatswana & Others* 1994 (3) SA 815 (BGD) at 846.

¹⁴²Thus the non-admission of professionals would be a justifiable limitation on the fundamental right in terms of art 22 of the Constitution.

¹⁴³Hinz (n26) 172-3 argues for a broad interpretation of the term 'legal practitioner' which would allow any person acquainted with customary procedures to represent the accused.

¹⁴⁴Or two head of large stock or ten head of small stock.

¹⁴⁵Section 3(2) of the Proclamation.

¹⁴⁶*Ex parte A-G of Namibia, in re corporal punishment by Organs of State* 1991 (3) SA 76 (NmSC).

¹⁴⁷See *S v Williams & Five Similar Cases* 1994 (4) SA 126 (C) at 139, *S v Petrus* [1985] LRC 699 (Botswana) and *Ncube v State* 1987 (2) ZLR 246 (S) and *S v A Juvenile* 1990 (4) SA 151 (ZS), where the Zimbabwe Supreme Court forbade corporal punishment of adults and of juveniles, respectively.

¹⁴⁸30 March 1994 (unreported decision No 39/94).

Despite the earlier Supreme Court ruling, the conviction was held to be invalid. The High Court said that the customary law providing for corporal punishment did not 'originate from or owe its existence to the colonial government or regimes', and that, if 'the traditional authorities were given the opportunity to appear and put their case before the Supreme Court ... they probably would have made an important contribution to the debate on ... what native law and custom is in regard to corporal punishment and whether or not corporal punishment in toto or in some instances, should be declared unconstitutional in their particular circumstances ...'.¹⁴⁹ More could no doubt be made of this analysis. If the terms 'cruel, inhuman or degrading' were more thoughtfully considered in cultural context, infliction of corporal punishment would not necessarily be deemed unconstitutional. But, in the face of Supreme Court precedent, the judgment in *Sipula's* case seems no more than an argument ad misericordiam.

VI WOMEN

1 PATRIARCHY AND REFORM

The status of women in most parts of Africa is dictated by a deeply entrenched tradition of patriarchy. Broadly speaking, this term denotes the deference women and juniors are expected to show to senior males; more precisely, it means the right senior men have to manage the property and lives of females and juniors falling under their control. Patriarchy is most pronounced in patrilineal societies, but even with matrilineal peoples, where a husband's authority over his wife is modified by the woman's attachments to her own kin group, women are still generally subordinate to men.¹

Male authority entails a corresponding disempowerment of females. Thus women are usually deprived of the capacities necessary to deal with the world at large.² Legal systems that endorse patriarchy, as most systems of customary law do, deny women three powers essential to realizing their autonomy. In common-law terms, these are contractual and proprietary capacity and locus standi in judicio.³

The universal justification for treating women in this way is that they are intellectually immature and so cannot form a proper judgment. Women are therefore assimilated to the status of children and, like children, they are subjected to the control of senior men.⁴ Because women are legally powerless, they are in principle not eligible for political office and in courts and public forums they are expected to remain silent and submissive. 'A "good woman" is depicted as being weak, shy, passive - in fact she "doesn't speak up".⁵ She cannot (directly at least) negotiate her marriage, terminate it or claim custody of her children. It is true that in domestic contexts a woman's responsibility for food-production and child-rearing allows her somewhat greater freedom of action, but she must nevertheless be prepared to accept her husband's decisions.

¹With urbanization, however, matrilineal principles tend to weaken, thereby allowing the husband greater authority: Becker & Hinz *Marriage and Customary Law in Namibia* 77.

²Hence a woman's public acts are treated as nullities. Although the public/private dichotomy has been a powerful conceptual framework for the study of women's issues (Rosaldo in Rosaldo & Lamphere *Women, Culture and Society* 23ff), it is now argued that this distinction is typical of western thinking and has the effect of distorting perceptions of African society: Lebeuf in Paulme *Women of Tropical Africa* 93ff. See the critique of this dichotomy above ch IV(2)(f).

³Female capacity to commit crimes and delicts would be similarly affected. See the South African decisions in *Mhlongo v Nzuza* 1935 NAC (N&T) 13; *Mlondleni v Magcaka* 1929 NAC (C&O) 10 and *Jali v Jali & others* 1969 BAC 1 (NE).

⁴It does not follow, however, that customary law regards women as slaves or chattels, although this was a frequent perception of the colonial authorities.

⁵Becker 'Gender Aspects of Traditional Authorities and Traditional Courts in a Democratic society: Examples from Northern Namibia' paper delivered at a workshop on Traditional Authorities in the Nineties - Democratic Aspects of Traditional government in Southern Africa (1995) 16.

Before colonization African women probably enjoyed a higher status than they do now.⁶ Capitalism, indirect rule and the official code of customary law were all factors contributing to the decline in their position.⁷ The effect of capitalism, in particular, was to open new opportunities for men rather than women; and the general monetarization of the economy, together with the fact that men had better access to wage-earning jobs in the south, meant that males could escape the strictures of traditional authority to gain economic and social independence.⁸ Women had stay behind to rear children, care for the old and sick and keep the subsistence economy going.⁹ The long-term effect of this regime was to downgrade the position of women in both the family and market place.¹⁰

*'[T]he fact that women were landed with more work and responsibilities did not mean that they gained in terms of freedom and independence. No woman could ever challenge her husband for control of the family income and property.'*¹¹

Women now suffer all the handicaps of social and economic insecurity without the legal power necessary to change their circumstances. In the nineteenth and early twentieth centuries, South African authorities were sympathetic to the plight of indigenous women, whom they regarded as living in a state of virtual bondage, and various measures were taken to discourage the practices believed to be responsible, namely, bridewealth, polygyny and forced marriages.¹² Few women were desperate enough, however, to risk losing what little they had by way of patriarchal support in

⁶Guy in Walker *Women and Gender in Southern Africa to 1945* 33ff explains why the current understanding of gender oppression is not applicable to the women of pre-colonial Africa. Although subordinate to men, women exercised control over the production of staple foodstuffs, and their fertility (a central value in a non-materialist, subsistence economy) gave them status and a degree of independence.

⁷With the Herero, for instance, although women were always said to have low status, their current position seems in fact to be due to socio-economic change: Becker & Hinz (n1) 85. Becker (n5) 4-5 shows how the South African administration was concerned to introduce 'a new brand of male, preferably "virile", traditional leaders. Women with direct or indirect power in the traditional authorities were obviously perceived as a disturbing threat to the colonial effort to influence customary law with the aim of securing control over the populace, and, in particular, securing the smooth working of the system of male migrant labour.' Neither the colonial administration nor African elders were especially concerned with the predicament in which women found themselves, for both had vested interests in maintaining an African 'tradition' of patriarchy. See Mbilinyi (1988) 16 *Int J Sociology* L 1.

⁸Under the South African administration, women from outside the police zone were not permitted jobs in southern and central Namibian towns nor could they join their husbands there: Becker *Namibian Women's Movement 1980-1992* 95-6.

⁹Becker op cit 98-9. Such work was not, however, deemed wage labour, because it had no price attached. Hence, as Becker op cit 97 says: 'Women have thus lost much of their former recognition as important producers.'

¹⁰A phenomenon common to much of Africa and the colonial world. See the accounts by Young in Kuhn & Wolpe *Feminism and Materialism* 124ff; Etienne & Leacock *Women and Colonization* 17ff; Howard in Welch & Meltzer *Human Rights and Development in Africa* 52-3; Mbilinyi (1972) 10 *J Mod Afr Studies* 57; Remy in Reiter *Toward an Anthropology of Women* 358ff; and Bank (1994) 53 *Afr Studies* 89ff.

¹¹Hishongwa *The Contract Labour System and its Effects on Family and Social Life in Namibia* 100.

¹²See Welsh *The Roots of Segregation* 69-70 and 84-5.

exchange for the unknown vicissitudes of a legal independence guaranteed only by inaccessible colonial courts.¹³

By the 1930s the government's enthusiasm for the cause of African women had waned. Thus, when South Africa took up the mandate over South West Africa, female status was no longer a live issue.¹⁴ In any event, the South African administration was more concerned to regulate African lives for grander political purposes of segregation (and later apartheid) than to intervene in domestic relations. And, later, when separate development was introduced, South Africa could conveniently wash its hands of the problem of ameliorating the status of women; family law reform became the responsibility of the new 'territorial authorities'.

The struggle for freedom from apartheid and South African rule included a struggle for equality of the sexes. In 1985, Sam Nujoma and Oliver Tambo made a joint pledge that they would not 'consider [our] objectives achieved, our task completed, or our struggle at an end until the women of Namibia and South Africa are fully liberated'.¹⁵ Legal force was given to this political commitment by art 10 in Namibia's Constitution which provides that 'No persons may be discriminated against on the grounds of sex ...'.¹⁶ Later, the country's ratification of the international Convention on Elimination of All Forms of Discrimination against Women (CEDAW) held out further promise of legal reform.¹⁷

Yet Namibian women have reason to be sceptical of paper promises. Experiences in Zimbabwe and Mozambique indicate that once the political battle against racial inequality has been won women's issues are quietly forgotten.¹⁸ Patriarchy is an exceptionally powerful system of beliefs and practices and men cannot be expected willingly to sacrifice the privileges it affords them. Any abrupt change is unlikely to win their co-operation, especially the support of traditional rulers, the guardians of customary law.

¹³See Simons *African Women* 188, Shropshire *The Bantu Woman under the Natal Code of Native Law* 22 and Burman in Walker (n6) 69-70.

¹⁴Instead, the state sought to bolster the patriarchal authority of traditional rulers in an attempt to 'retribalize' South African society: Walker in Walker (n6) 18.

¹⁵Cited by Murray (1991) 3 *Afr J Int & Comp L* 597.

¹⁶See Murray *op cit* 598-9 regarding preference for use of the term 'gender'.

¹⁷Ratified by the Namibian Parliament in 1992. According to art 144 of the Constitution such international agreements form part of the law of Namibia. What is more, the norm of non-discrimination on the ground of sex or gender is also firmly established in the general corpus of international human rights law. See, for example, the rights of women in marriage under art 16(1) of the United Nations Declaration on Human Rights and art 23(4) of the International Covenant on Civil and Political Rights.

¹⁸See Albertyn 1994 *Acta Juridica* 49 fn46.

2 THE IMPLICATIONS OF ART 10 OF THE CONSTITUTION FOR CUSTOMARY LAW

(a) Control of property

In a patriarchal system women normally have few opportunities to acquire property or the power to use and dispose of it at their discretion. Throughout Africa, although women have always played a vital part in food-production, they are usually denied access to and control over the *means* of producing food - land and livestock - which fall to senior men.

Exceptions to this general proposition may be encountered in particular communities, partly because different local traditions exist and partly because new ideas about the status of women may have taken root. In Caprivi, for instance, where cognatic descent systems prevail, marital estates are held jointly: crops harvested from the land are deemed the common property of the spouses because they 'have ploughed together'.¹⁹ Here women can in principle acquire and dispose of their own self-acquired property.²⁰

In matrilineal societies, where a wife's affiliation to her own family is never entirely lost, control of major items of property - cattle, land and the produce of land - is vested in and inherited through the matriline.²¹ It is true that in Owambo and Kavango (areas of where matrilineal kinship prevails) individual control of property is recognized (usually in respect of such personal assets as clothing, ornaments and household utensils) and that women can and do acquire cattle through inheritance or sale of agricultural produce;²² but male members of the woman's lineage still tend to control stock, and people speak of cattle being 'men's property'.²³ Moreover, although ownership and control of the all-important consumer goods associated with the modern economy usually go to the person who acquired them, the tendency again in Owambo is for men to be deemed 'owners'.²⁴

With the Herero, on the other hand, a woman's individual right to her own property seems to have been clearly acknowledged. Spouses had their own defined belongings, and women could own clothing and livestock received from their husbands or

¹⁹Becker & Hinz (n1) 101.

²⁰Becker & Hinz (n1) 99ff. At 103 the authors note a divergence in the Subia and Yeyi khutas: in the former the husband would be in control of property the wife acquired during marriage.

²¹In Mbukushu in Kavango, however, it seems that land was held individually by the spouses and that on a husband's death his widow would be entitled to his store of grain: Becker & Hinz (n1) 66.

²²And see Becker & Hinz (n1) 84 regarding the Herero.

²³The husband's property, of course, remains his own.

²⁴Becker & Hinz (n1) 64-5 and 70-1. Note, however, that most marriages - in Owambo at least - are concluded in terms of a pre-marital property declaration under s 17(6) of the Native Administration Proc 15 of 1928. The effect of this declaration is to render the matrimonial proprietary regime in community of property. Becker & Hinz (n1) 64 found that spouses neither understand nor obey the dictates of this law, which is peculiarly western.

from their maternal grandfathers or fathers (as dowry).²⁵ Because this was a transhumant society, everyone used to have access to grazing. Today a headman's permission must be sought in order to erect a house; and, although a woman may be allotted land, if she marries, the allotment goes to her husband.²⁶

Property relations are one of the many unexplored areas of customary law, and, while it appears from the above that in certain communities women cannot be regarded as 'propertyless', the vaguely conceived notion that patriarchy is an African tradition could at any time be invoked to their disadvantage. (South Africa holds an ominous precedent in this respect, since a generalized rule developed in the courts there that women lack all 'proprietary capacity'.)²⁷ If the idea that women should be subordinate to men is extrapolated from this African tradition to cover wages and salaries derived from the cash economy,²⁸ women may end up losing their income.²⁹

Conversely, property should be seen as the key to social empowerment.³⁰ Once women acquire definite proprietary rights, their overall position tends to improve. Two issues are involved here. The first is (juridically speaking) a *power* to acquire property; the second is (again technically speaking) a *freedom* or *right* to use and dispose of property.

Article 16(1) of the Constitution is the only provision dealing directly with these questions. It gives all persons 'the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees'.³¹ Unfortunately, however, it seems that subart (1) is opposable against the state only, since subart (2) deals with expropriation and due process. If this provision is only vertically applicable, it

²⁵While married, although a husband was responsible for looking after his wife's property, it remained hers. Despite these apparently clear rules, it is not certain whether a wife had power to dispose of her property: Becker & Hinz (n1) 86.

²⁶Becker & Hinz (n1) 84-5.

²⁷Although it is not clear what is meant by this phrase. A 'proprietary incapacity' could denote the absence of one or all of the following: the *power* to acquire property, the *freedom* to use and dispose of it or the *right* to vindicate it.

²⁸Courts in South Africa, for example, never seriously questioned adult male capacity to earn and to control such property. In fact they were quick to assert the individual's absolute rights: Chanock (1991) 32 *J Afr History* 77ff. Conversely, where women worked to acquire money - and most women through force of circumstances had to enter the labour market - the courts gave control of their income to men by describing a wife's acquisitions as 'house property', a rule that fitted in with the structure of polygynous households. See *Ntombela v Mpungose* 1950 NAC 150 (NE); *Mpantsha v Ngolonkulu & another* 1952 NAC 40 (S); *Mpungose v Shandu* 1956 NAC 180 (NE); *Sithole* 1967 BAC 18 (NE); and Simons (n13) 196-8.

²⁹Thus, in South Africa women were said to be 'minors' subject to 'guardianship': Chanock op cit 80-1.

³⁰Hirschon *Women and Property/Women as Property* 1; Howard *Human Rights in Commonwealth Africa* 199; Armstrong et al (1993) 7 *Int J Law & Family* 343.

³¹This provision would imply eligibility to hold property and protection of the claims by persons who first gained control of an object, created it or worked on it. See Lewis (1992) 8 *SAJHR* 410 on the 'right to property'.

cannot be asserted by women against their husbands and guardians in support of a power to acquire property and a right to use it at will.

In the circumstances, art 10 of the Constitution (the equality clause) holds better prospects, since the wording and the nature of the stipulated rights do not at the outset exclude horizontal application. To the contrary, if customary law is vague or uncertain, there is reason for extending constitutional provisions to private relationships via the German notion of *mittelbare Drittwirkung*.³² Hence, under art 10 it can be argued that women should be entitled to acquire, hold and dispose of property on the same terms as men.

(b) Interpretation of art 10

The decision to apply art 10 to the rules governing female proprietary capacity - and, for that matter, the other capacities considered below - does not exhaust our inquiry, for the article contains two subsections permitting different interpretations. Subarticle (1) declares that: 'All persons shall be equal before the law.' Subarticle (2) provides that: 'No persons may be discriminated against on the grounds of sex'

Although the collocation of these two provisions might at a superficial reading suggest repetition of the same norm, one in positive and one in negative terms, it must be assumed that those responsible for drafting the Constitution did not intend a tautology. Thus the right to equality in subart (1) and the right to be free of discrimination in subart (2) must mean different things. Using a purposive interpretation, that would take into account the Principles of State Policy in art 95(a) to uplift women, it is possible to reconcile the different meanings in art 10. A right to equality functions as an umbrella concept, to be supplemented by specific instances of discrimination under the prohibition against discrimination and by programmes of affirmative action.³³

While a freedom from discrimination is relatively unambiguous - it implies that one person suffers treatment less favourable than another - a right to 'be equal before the law' can carry at least two meanings.³⁴ It could be construed in a procedural sense to suggest that every person of whatever rank or class in society should be subject to the law of the realm as administered by the ordinary courts.³⁵ Such procedural (or formal) equality leaves untouched the causes and conditions of inequality and it ignores the problem that most women are in no position to act on their newly won competence to take legal action to improve their situation.³⁶

³²Where the rules of private law are ambiguous and contradictory, fundamental rights can be used to create applicable norms: see above ch IV(2)(g).

³³Such as those contemplated in arts 23(2) and 95 of the Constitution. See Albertyn & Kentridge (1994) 10 *SAJHR* 155-7.

³⁴See Albertyn & Kentridge *op cit* 152-3 and O'Donovan & Szyszczak *Equality and Sex Discrimination Law* 3-8.

³⁵The interpretation adopted by *A-G of Canada v Lavell* (1974) 38 DLR (3d) 481 at 494-5. In South Africa *Mfolo & others v Minister of Education, Bophuthatswana* 1994 (1) BCLR 136 (B) at 139-141 interpreted a similar provision to mean not only equality before courts of law but also equality in legislation. In this regard, the court followed the approach in *Cabinet for the Territory of SWA v Chikane* 1989 (1) SA 349 (A) at 363.

³⁶The reason why early colonial attempts to emancipate women failed.

According to a less restrictive interpretation equality would mean being placed in the same *material* position as men,³⁷ a construction that requires change to the substantive norms regulating social life.³⁸ Precedent for reading art 10 in this manner comes from *Ex parte Cabinet for the Interim Government of SWA: in re Advisory Opinion in terms of s 19(2) of Proc R101 of 1985*.³⁹ When interpreting art 3 of the 1984 Bill of Fundamental Rights and Objectives, the Court rejected a purely formal approach. It held that discrimination could not be construed to mean only non-material prejudices; it had rather to be interpreted in a broad sense to include economic advantage.⁴⁰

Hence, at the minimum, reform of the status of women would mean formal equality - allowing women full access to the justice system in order to protect what rights they already have - but this understanding of equality would be no great advance on the existing law. Clearly, if Namibia is to fulfil its commitment to affirmative action and is to discharge its obligations under CEDAW,⁴¹ women must be given material equality. They must be given at least the same capacity as men to acquire, enjoy and dispose of property.

However, if the material interpretation of art 10 recommended above is accepted, even more is entailed. Equality is a prescriptively empty concept in the sense that it does not prescribe exact standards of measurement. While adult African men are normally taken as the model of comparison for women, there is no reason why this assumption must be accepted. Women have their own particular problems and aspirations, and, instead of forcing them to adopt a male status, it may be that special measures should be taken to meet their specific needs.⁴²

(c) Contractual capacity and locus standi

A logical corollary of removing control of property from certain classes of people is a rule depriving them of contractual capacity.⁴³ Although there is no Namibian data available on this principle, it would be true to the logic of customary law if women were denied the power to contract.⁴⁴

³⁷The focus then shifts from securing a criterion of entry to a status to achieving a result. This is the construction that Albertyn & Kentridge (n33) 151-5 urge for the equivalent of art 10 of the Namibian Constitution in terms of a purposive interpretation.

³⁸This is the approach in Canada: see *Andrews v Law Society of British Columbia* (1989) 56 DLR (4th) 1 at 11-13 and Albertyn & Kentridge (n33) 158-9. Similarly, in Germany art 3(1) of the *Grundgesetz*, which provides that all persons shall be equal before the law, is read together with art 3(3), the prohibition on discrimination, to require substantive equality: Currie *The Constitution of the Federal Republic of Germany* 322.

³⁹1988 (2) SA 832 (SWA).

⁴⁰At 855.

⁴¹Especially arts 15(2) and 16(1)(h).

⁴²Accordingly, norms of equal treatment/non-discrimination should not be understood to preclude measures designed to achieve the protection and advancement of persons previously disadvantaged by unfair discrimination. The implementation of a more far-reaching policy of social upliftment goes beyond the scope of judicial review, however, for reasons explored below ch VI(3).

⁴³*Ndhlovu* 1954 NAC 59 (NE).

⁴⁴If not in all circumstances, at least in some. See Becker & Hinz (n1) 72. With regard to contractual capacity and locus standi, however, South African courts have tended to interpret the de-

Coupled with the deprivation of proprietary and contractual capacity is a denial of locus standi in judicio.⁴⁵ While some empirical data is to hand, the issue of locus standi under customary law is still not entirely clear. In Owambo and Kavango, for example, traditional authorities claim that women are free to present cases themselves, but women say that they are excluded from active participation.⁴⁶ With the Herero and in Caprivi, on the other hand, it seems clear that women are excluded from court proceedings and that they are obliged to bring suits via their husbands.⁴⁷

Denial of locus standi rests on an assumption that women are not versed in the forensic arts and accordingly need someone to argue their cases for them.⁴⁸ It follows that the rule is procedural in nature and must be distinguished from the substance of a claim.⁴⁹ If a woman has no right of action, as, for example, where damages are sought for her seduction⁵⁰ or guardianship of her children is claimed,⁵¹ her presence in court is incidental. Her guardian has the substantive right to bring the suit and she is normally required only to give evidence.

Superficially, art 12 of the Constitution appears to have a direct bearing on locus standi. It provides that 'all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal'. But the term 'entitled' in this clause is not the same as a power, namely, a capacity to pursue an action without assistance. 'Entitle' implies a correlative duty on the part of the state to make its tribunals accessible to all persons wishing to prosecute legal claims, and at present customary law does not prevent women from appearing in court, provided they comply with the procedural requirement of due assistance. Thus any improvement to the locus standi of women will have to be sought under art 10(1) of the Constitution, which affords every person equality before the law, or art 10(2), which prohibits discrimination.

Whether women should now be accorded the same capacities as men will depend upon an answer to the question whether constitutional norms are to be applied in private relationships. As far as the courts themselves are concerned, they are obviously bound as organs of state to uphold ch 3 of the Constitution; but it is not clear whether a woman

privation of capacity protectively, so that women were treated more like minors at common law. See *Zwane v Dhlamini* 1938 NAC (N&T) 278.

⁴⁵Cf Becker (n5) 6, who says that Kavango has no rules barring women from participating in court proceedings. They have equal right of audience and do not need the assistance of a male to prosecute a suit. In Owambo, on the other hand, no conclusive rule could be established, for, although there might not have been a rule barring women, they were usually represented by a male: Becker (n5) 7.

⁴⁶Becker & Hinz (n1) 73-4.

⁴⁷Becker & Hinz (n1) 87 regarding the Herero and 104 regarding Caprivi. Note, however, the age of the sources cited on the Herero.

⁴⁸Hence, in South Africa the common-law institution of minority seems to have influenced customary law. Formally, at least, a woman cannot be denied her action; she merely requires assistance to bring it. Thus her guardian must appear in court with her: *Ngcamu v Majozi* 1959 NAC 74 (NE); cf *Zondi v Southern Insurance Association Ltd* 1964 (3) SA 446 (N).

⁴⁹Bennett *Sourcebook* 330-1.

⁵⁰See the South African cases of *Kumalo v Zungu* 1969 BAC 18 (NE) and *Mkhombo v Mathungu* 1980 AC 79 (NE).

⁵¹See the South African case, *Tabede v Mlotywa* 1943 NAC (N&T) 71.

could invoke art 10 in a dispute with her husband or guardian.⁵² None the less, if customary law is unclear whether a woman has locus standi, it should be construed to be in harmony with the fundamental rights (*mittelbare Drittwirkung*).

(d) Statutory age of majority

All issues of capacity could be cured by a ruling that the Age of Majority Act applies to persons subject to customary law.⁵³ Because majority status empowers generally, any woman over the age of 21 would automatically be able to acquire and dispose of property, enter contracts, sue in court and act as emancipated adults on a par with men.

Whether the Act overrides customary law, however, is a moot point. Although basic legal principles, not to mention art 66 of the Constitution, would suggest that customary law is nullified to the extent that it conflicts with any statute,⁵⁴ there is as yet no indication whether the legislature intended the Age of Majority Act to apply to persons subject to customary law.

If Namibian courts decide to apply the Age of Majority Act to African women, they would be advised to avoid the course taken by the Zimbabwe Supreme Court. With the specific aim of empowering women, conditions for recognition of customary law in Zimbabwe were amended to allow the Legal Age of Majority Act⁵⁵ to apply to persons subject to customary law. When this reform came to be implemented in *Katekwe v Muchabaiwa*,⁵⁶ the Supreme Court went much further than simply giving major women locus standi. Dumbutshena CJ found that when a woman attained the age of 18 years she was completely emancipated,⁵⁷ and, in consequence, she no longer required a guardian to assist her in pursuing legal rights or incurring obligations. As a result, the Chief Justice held that a father lost his right to sue for damages for the seduction of his major daughter, since the right had passed to the woman.⁵⁸

Dumbutshena CJ went even further to say (although this was an obiter dictum) that in view of the Legal Age of Majority Act a father no longer had an independent legal entitlement to demand bridewealth when his daughter married.⁵⁹ He reasoned that, if

⁵²Whatever the outcome, Namibia's obligation to respect the principles underlying CEDAW would suggest that immediate legislative and/or judicial action be taken. Article 15(2) of the Convention, which is directly relevant to contractual capacity and locus standi, provides that: 'States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.'

⁵³57 of 1972.

⁵⁴The ruling in some South African cases: *Mnyandu* 1974 BAC 459 (C); *Mpanza v Qonono* 1978 AC 136 (C) at 139 and *Khumalo v Dladla* 1981 AC 95 (NE).

⁵⁵15 of 1982. This was hailed as the woman's charter of emancipation: McNally (1988) 105 SALJ 437.

⁵⁶1984 (2) ZLR 112 (S).

⁵⁷He claimed that Parliament had intended to equalize the status of men and women by removing the legal disabilities imposed on African women by customary law.

⁵⁸At 127-8.

⁵⁹At 127. The decision whether to pay bridewealth rests entirely with the daughter or bride-to-be.

women gained full contractual powers when they turned 18, they could contract marriages without the consent of their guardians. It followed that a father's consent was irrelevant to the marriage and that he could not insist on bridewealth, the seal of a valid union.

Arguably this case was wrongly decided.⁶⁰ Majority status gives women *powers* (or competencies) that they formerly lacked. It does not necessarily give them additional *rights*. Women subject to customary law never had the right to sue for damages for their own seduction (the delict was conceived to be in the interest of their guardians) nor did they have a right to claim bridewealth for their own marriages. The fact that a woman's capacity is governed by common law does not mean that her substantive rights should be determined by the same system.⁶¹

3 JUDICIAL REVIEW UNDER THE EQUALITY CLAUSE

Article 10 of the Constitution, even if deemed horizontally applicable, does not give the courts an unlimited competence to change customary law. For instance, it would be wrong for a court to use the equality clause as the sole ground for permitting women to sue for damages for their own seduction or for damages for adultery committed by husbands.⁶² Under customary law, because these delicts were designed to protect the interests of the woman's father or husband, she had no right of action. Rather than change customary law via the medium of constitutional rights, equality may be achieved by more judicious choice of law, ie by allowing women to sue under the common law.⁶³

Comparison of a woman's lack of rights in matters of guardianship and succession gives a clearer indication of the scope of judicial review under the Constitution. If customary law does not allow women to act as guardians of their minor children, it is a simple enough matter for the courts to rule that she has the same right as her husband.⁶⁴ To change the rule barring widows from inheriting their husbands' estates is a different issue, for it involves the courts in a more complex business of law-making. In the case of guardianship, a court has only to declare that a mother has the same right as the father. In the case of succession, a court could not merely decide that the customary rule is void: it would have to stipulate how much widows could inherit and in what circumstances.⁶⁵ Because details of this nature cannot be determined in judicial proceedings, the proper medium for reform would be legislation, which permits full investigation of the social context and consultation with interested groups.

⁶⁰See the critique by Ncube (1983-4) 1 & 2 *Zimbabwe LR* 217ff.

⁶¹Ncube op cit 225. The generous interpretation of art 10 of the Constitution proposed by Albertyn & Kentridge (n33) above, however, might well permit more ambitious reforms such as the ones in this case.

⁶²Or to conclude their own customary marriages without payment of bridewealth, as the court intimated in *Katekwe v Muchabaiwa* 1984 (2) ZLR 112 (S).

⁶³For which see above ch II(2)(d).

⁶⁴And in Caprivi, for instance, customary law is flexible on this issue: Becker & Hinz (n1) 105.

⁶⁵The courts do not bear sole responsibility for implementing the bill of rights. If a topic requires comprehensive inquiry and debate or if it is highly controversial, the legislature should take the initiative.

VII CHILDREN

1 AFRICAN TRADITION AND THE PARENT-CHILD RELATIONSHIP

A noticeable feature of the ethnographic literature on Africa is a scant concern with children. While the rites de passage are usually well documented, little attention is paid to issues that in the late twentieth century are considered to be major social issues: the maintenance and protection of children. This deficiency is attributable to the nature of traditional African societies and the perceptions of early anthropologists (in whose own culture the welfare of children was only beginning to emerge as an issue).

Traditionally, customary law was mainly concerned with deciding to which family a child should be affiliated. In matrilineal societies, although children were reared in the nuclear family, their association with their mother's kin remained strong, for it was there that they would inherit. In patrilineal societies, provided bridewealth had been paid, the father's family had a superior claim,¹ a principle that was underwritten by the system of patrilineal succession and patrilocal residence. Within families, children might be reared by various different relatives, since there was no fixed idea that children had constantly to be in the physical custody of their biological parents.²

Under customary law African children enjoyed no especially favoured position.³ The welfare of the family predominated, with the result that a child's interests were often subordinated to those of the family.⁴ In order to cultivate relations with kinfolk, for example, children might be given over to distant relatives to provide companionship or labour in the fields, and a common method of surviving lean years used to be the pledging of girls in marriage.⁵

A child's claim against the family for food and shelter was of little account,⁶ because it was taken for granted that all members of a family would be adequately maintained. Children were expected to assist with the tasks of food-production, no matter how onerous and time-consuming this work might have been.⁷ From an early age,

¹It was considered important that a person grow up under the protection of patrilineal ancestral spirits: Armstrong in Alston *The Best Interests of the Child* 158.

²Fostering was a widespread practice that served a variety of different needs: Nhlapo in Eckelaar & Sarcevic *Parenthood in Modern Society* 38. In Africa fostering is often resorted to in times of economic distress when children are sent to whoever can offer them (and their families) the best advantages: Armstrong in Alston op cit 170-1 and 176-82.

³In contrast to western societies, where children enjoy a privileged position. See An-Na'im in Alston op cit 66.

⁴In fact, the family's interests and those of the child were considered inseparable: Rwezaura in Alston op cit 100.

⁵In order to obtain bridewealth, which would then be used to sustain the family: Rwezaura in Alston op cit 90-1.

⁶The head of the family was expected to look after all those in his care, but the rights of dependants were not thought of in categorical, legal terms. See, for instance, the discussion of children's rights to maintenance by Bennett 1980 *Acta Juridica* 115ff.

⁷See further Rwezaura in Alston (n1) 97.

they had to be prepared for the life-long duty of supporting kin, a vital obligation in pre-capitalist societies, where the younger generation was the foundation of social security.

All juniors fell under the charge of the head of the household.⁸ They had no legal capacities, hence in any dealing with the outside world they had to be represented by the familyhead. The exact ambit of his authority was not prescribed in legal terms.⁹ Granted, it was not as extreme as the ancient Roman idea of a *jus vitae necisque*, but it did imply a conglomeration of rights and powers, including rights to a child's services and powers to discipline and arrange marriages.

A simple, subsistence economy, when families were self-sufficient and their material wants were few, was the basis of the parent-child relationship. All members, whether young or old, could confidently expect a lifetime's sustenance and protection. Children do not appear to have had any precise legal rights and customary law had no set procedure enabling them to sue their guardians (nor did third parties have standing to intervene on a child's behalf).¹⁰ The absence of special mechanisms to protect children suggests that neglect or abuse were not social problems.¹¹

The social order on which this regime rested has, of course, changed. Elsewhere - although these developments seem not to have been recorded in Namibia - generational power has shifted from seniors to juniors, and, as a result, senior males have lost much of their former authority.¹² More serious is the dislocation of the extended family through migrant labour, a phenomenon widespread in Africa and one with far-reaching consequences for support obligations. The atomized and fragmented domestic units which everywhere have come to be associated with urban society cannot be relied upon to care for the children born into them. In households subsisting on or below the poverty datum line children are likely to experience neglect and exploitation.

2 CHILDREN'S RIGHTS IN INTERNATIONAL LAW

One of the major concerns to have emerged in international law over the last twenty years is the rights of children. This movement had its roots in western systems of law. Both the United Nations' Declaration (1959)¹³ and the Convention on the Rights of the Child (1989)¹⁴ were grounded on western ideas¹⁵ - although the surprisingly prompt and general

⁸ 'Juniors' are generally those who have not yet married and established their own households.

⁹ Uzodike (1990) 2 *Afr J Int & Comp L* 282.

¹⁰ In western systems of law, the state has an overriding power to protect all children within its jurisdiction (Bennett (n6) 120), but customary law treats the parent-child relationship as a private matter: Armstrong in Alston (n1) 155.

¹¹ Bennett (n6) 117-19.

¹² See Bennett *Sourcebook* 345-50.

¹³ 20 November.

¹⁴ For the text see (1989) 28 *ILM* 1448ff.

¹⁵ De Villiers (1993) 3 *Stellenbosch LR* 296 fn49.

acceptance of these instruments had the effect of universalizing their provisions.¹⁶ Even Africa's Charter on the Rights and Welfare of the Child,¹⁷ which claims to foster African culture,¹⁸ clearly drew its inspiration from trends set in the United Nations.

By far the most important tenet of western jurisprudence to have entered international law is the rule that a child's interests are to be preferred above those of anyone else. All the international instruments,¹⁹ including the African Charter,²⁰ have encoded this rule. The effect of making a child's interest the paramount consideration has been, first, to favour a child above its parents and family and, secondly, to purge parental power of its repressive elements. Parents may exercise their authority only to protect or nurture their children; discipline must be administered humanely in a way that is consistent with the child's dignity,²¹ and children must be protected from violence, abuse and exploitation.²²

In addition, the UN Convention and the African Charter provide that every child is entitled to enjoy the rights contained in the conventions without distinction as to the child's (or the legal guardian's) 'race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'.²³ This norm of non-discrimination obliges states, *inter alia*, to remove the stigma of illegitimacy.²⁴

Any rule seeking to protect children (especially from their parents) requires third-party intervention in the family domain, for children are clearly incapable of acting on their own rights.²⁵ As the agent ultimately responsible for the welfare of all persons

¹⁶By December 1993, for example, the Convention had attracted 155 ratifications: Alston in Alston (n1) 1-2. And Arts (1992) 5 *Afr J Int & Comp L* 141 notes that many African states ratified the Convention.

¹⁷This, too, was preceded by a Declaration of the Rights and Welfare of the African Child (1979).

¹⁸The Preamble, for instance, urges African states to take 'into consideration the virtues of their cultural heritage, historical background and the values of African civilisation' and art 31 obliges children to preserve African cultural values and family cohesion and to respect parents and elders. See too art 11, which obliges states to direct the education of children towards preserving and strengthening African morals, traditional values, and cultures. See (1991) 3 *Afr J Int & Comp L* 173ff and the commentary by Thompson (1992) 41 *ICLQ* 432ff. Arts (n16) 144ff gives a comparison between the UN and OAU conventions

¹⁹Article 3(1) of the UN Convention. See Alston (n1) 15-20 regarding the role to be played by this principle.

²⁰Article 4. See Arts (n16) 158.

²¹Article 19(1) of the UN Convention and art 20 of the African Charter.

²²Article 19 of the UN Convention. The vulnerability of children has been a source of various special provisions aimed at preventing their maltreatment. Article 32 of the UN Convention and art 15 of the African Charter prohibit child labour, and art 35 of the UN Convention and art 29 of the African Charter ban the abduction, sale or traffic in children by any person, including parents or legal guardians.

²³Article 2(1) of the UN Convention and art 3 of the African Charter.

²⁴See Thompson (n18) 441.

²⁵See Stoljar (1971) 4 *IECL* ch 7 paras 8-10.

under its jurisdiction, the state has thus become upper guardian of all minors.²⁶ International law does not, however, allow the state to usurp the functions of parents and families. The family is still taken to be 'the natural unit and basis of society' and children are still entitled to its support and protection.²⁷

3 ARTICLE 15 OF THE CONSTITUTION: HORIZONTALITY AND THE INDETERMINACY OF CONCEPTS

Article 15 of the Constitution deals specifically with children's rights. It does not incorporate all the norms developed in international law²⁸ - two notable omissions are rules favouring the child's interests and prohibiting discrimination on the ground of age - but Namibia has ratified the UN Convention on the Rights of the Child, and so it is committed in broad terms to realizing the precepts of the treaty.

Article 15 provides that:

'(1) Children shall have the right from birth to a name, the right to acquire a nationality and, subject to legislation enacted in the best interests of children, as far as possible the right to known and be cared for by their parents.

(2) Children are entitled to be protected from economic exploitation and shall not be employed in or required to perform work that is likely to be hazardous or to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development. For the purposes of this Sub-Article children shall be persons under the age of sixteen (16) years.

(3) No children under the age of fourteen (14) years shall be employed to work in any factory or mine, save under conditions and circumstances regulated by Act of Parliament. Nothing in this Sub-Article shall be construed as derogating from in any way from Sub-Article (2) hereof.

(4) Any arrangement or scheme employed on any farm or other undertaking, the object or effect of which is to compel the minor children of an employee to work for or in the interest of the employer of such employee, shall for the purposes of Article 9 hereof be deemed to constitute an arrangement or scheme to compel the performance of forced labour.'²⁹

The first, and the most important question to arise from art 15 is whether the rights it catalogues are applicable in private relationships. Certain rights, such as those contained subart (1), rights to a name and nationality, are by their nature opposable only against the state. Others, such as the prohibition on employment of children in factories, mines and farms (subarts (3) and (4)), are clearly applicable in the private sphere. In the case of rights contained in subart (2), on the other hand, the question of horizontality is an open one.

²⁶Hence, arts 3 and 4 of the UN Convention.

²⁷The family thus bears the primary responsibility for raising children. See arts 5 and 9 and the Preamble to the UN Convention and art 18 of the African Charter.

²⁸De Villiers (n15) 306. Civil and political rights, however, will be covered by other provisions in the Constitution.

²⁹Article 15(5) deals with detention of children under the age of 16.

Two considerations extrinsic to the Constitution suggest that any doubts about horizontality should be resolved in favour of extending constitutional norms into the domestic sphere. First, Namibia is bound as a party to the UN Convention to modify its municipal law in accordance with its international obligations.³⁰ (Under art 144, 'international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia'.) Secondly, for purposes of common law at least, the child's best interests rule is already enforceable as a matter of public policy.³¹

More troublesome than horizontal application is the question whether rights contained in art 15 may be modified by socio-economic factors peculiar to Namibia. Many of the words used in the article - notably 'care', 'exploitation' and 'best interests' - are abstract and so general that, before they can be applied in concrete situations, they need to be interpreted, a process that might well require reference to factors external to the Constitution. Alternatively, of course, under art 22 rights may be limited by the exigencies of Namibian conditions.³²

The way in which children are reared in Africa is all too often dictated by poverty. A prevalent and unhappy reality, poverty has the unfortunate effect of distorting the application of constitutional rights.³³ Children from affluent backgrounds can expect to undergo a lengthy period of education before moving out into the world. In contrast, poorer children must, for the sake of survival, begin work at the earliest possible age.³⁴ What in an wealthy family would constitute harmful interference with the education of a child would almost certainly not in a family subsisting on the poverty datum line.³⁵

The Constitution has no provision, however, permitting economic differences to influence the interpretation or limitation of fundamental rights.³⁶ To the contrary, Principles of State Policy oblige the state to uplift those who are economically and socially disadvantaged.³⁷

Social or cultural considerations are another matter. In certain instances, construction of a basic right in terms of African cultural norms would not amount to a

³⁰The best interests principle is also contained in arts 5(b) and 16(1)(d) of the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), another convention adopted by Namibia.

³¹In South Africa, this approach has been extended to customary law: *Mokoena v Mofokeng* 1945 NAC (C&O) 89 and *Mbuli v Mehlomakulu* 1961 NAC 68 (S).

³²See discussion above ch IV(4).

³³Arts (n16) 142-3. As Armstrong in Alston (n1) 151ff notes, a child's best interests in the context of Zimbabwe are reduced to ensuring that the child has basic education and food. Kamchedzera (1991) 5 *Int J Law & Family* 243 acknowledges that, although poverty can have disastrous implications for child welfare, the psycho-social needs of children can still be protected.

³⁴The unhappy paradox is that the lower the standard of living, the more likely that children will have to forgo schooling to earn an income. See Burman in Burman & Reynolds *Growing up in a Divided Society* 8-11.

³⁵Uzodike (1990) 4 *Int J Law & Family* 86, however, says that deliberate child abuse in the form of physical battering or sexual molestation was rare in Africa. Instead, the main forms of mistreatment were exploitative child labour and neglect, both borne of poverty and ignorance.

³⁶Article 22, for example, allows limitation only by a law of general application.

³⁷See especially art 95(b) and (g).

limitation but rather to an extension. The word 'parents', for instance, as understood by the common law, normally denotes a child's biological father and mother. In African systems of kinship, on the other hand, 'parent' might include more remote kinfolk who for social purposes are classified as playing parental roles.³⁸ The latter interpretation would have the effect of widening a child's support network.

The best interests rule contained in the UN Convention is notoriously vague,³⁹ and it is often said to be an open invitation to courts to apply cultural norms.⁴⁰ Yet, because the rule is worded in relative terms, it performs the vital function of ranking conflicting claims and norms. For example, if two people were to claim custody of a child on the basis of different rules, whichever rule favoured the child would have to be chosen.⁴¹ On this understanding, if a conflict between common and customary law were to arise, whichever system worked in the child's favour would be preferred.

4 THE IMPLICATIONS OF FUNDAMENTAL RIGHTS FOR CUSTOMARY LAW

(a) The concept of a child

There are no universally recognized criteria for determining the status of childhood. Child- and adulthood are flexible social categories which are defined according to cultural stereotypes of ageing and socio-economic circumstances.⁴²

Under customary law childhood ended as the diacritics of adulthood were gradually accumulated. Physical and intellectual maturity were obviously critical, but so too were marriage, the foundation of a separate household⁴³ and sometimes an initiation ceremony.⁴⁴ In circumstances such as these, where adulthood does not depend on attaining a pre-determined age, the danger exists that a child's status can be manipulated by its guardian in order to deny the child rights and powers that come with majority.⁴⁵

Under art 15 of the Constitution no general age is fixed to determine childhood. Specific age limits are set for the enjoyment of certain rights.⁴⁶ According to art 1 of the UN Convention, however, 'child' is deemed to be a person under the age of 18 years for

³⁸The UN Convention is flexible in this regard. See, for instance, art 5.

³⁹Originally, for instance, the rule was taken to serve the interests of society as a whole: Eekelaar (1986) 6 *Oxford J Legal Studies* 168.

⁴⁰See Alston and Parker in Alston (n1) 19-20 and 39, respectively.

⁴¹See Alston (n1) 15-16.

⁴²Becker & Hinz *Marriage and Customary Law in Namibia* 72. A long period of childhood is a luxury that cannot be afforded in subsistence economies, where the life span is short and survival a struggle.

⁴³See, for example, Becker & Hinz *op cit* 72.

⁴⁴Becker & Hinz *op cit* 72 and 80. Considered below ch VII(4)(e).

⁴⁵Thus facilitating child marriage, Uzodike (n35) 88, or denying children the right to marry or to acquire their own property.

⁴⁶Thus for subarts (2) and (5) the age of 16 and for subart (3) the age is 14.

purposes of enjoying the rights contained in the treaty,⁴⁷ but the instrument does not oblige states to enact laws specifying an age of majority, so there is no basis for introducing a definite age limit on childhood in Namibian municipal law. The problem could be remedied, of course, by applying the Age of Majority Act to persons living according to customary law.⁴⁸

(b) Control of property

Persons who are not yet deemed independent heads of households generally have little control over property under customary law. Where families had to be self-sufficient subsistence units, rural economies in all parts of sub-Saharan Africa (at least in pre-capitalist times) dictated that the labour and earnings of all members were to be pooled for mutual benefit. The estate was managed by the head of the household, who was obliged to distribute assets to meet the needs of everyone under his care⁴⁹ whether these needs were day-to-day subsistence or the fines and damages flowing from delictual acts.⁵⁰ Thus whatever property a child obtained usually became part of the family estate unless it was specifically dedicated to the child's needs.⁵¹

These principles operated in the interests of the family as a group and only indirectly in favour of the individual. Where a subsistence economy changes to a market economy, however, the system may begin to work to the prejudice of the individual. Once junior men engage in wage labour, they gain economic autonomy relative to their seniors, and in the circumstances it seems inequitable to deprive them of control of their acquisitions. In fact, proprietary incapacity could amount to exploitation of child labour - ie the regular engagement of children in a productive or income-yielding activity from which the children do not benefit - which is prohibited both internationally and under art 15(2) of the Constitution.⁵²

Age of majority legislation would help to cure the problem, for any rule that a child is incapable of holding property, no matter what age he or she happens to be, would fall away once the child attained 21. But there is no indication that Namibian courts have applied the Age of Majority Act to persons subject to customary law.⁵³

⁴⁷And art 2 African Charter.

⁴⁸57 of 1972. In South Africa, although the Act has long been in operation, the courts have not applied it consistently: Bennett *Sourcebook* 350-5.

⁴⁹The judgment in *Mlanjeni v Macala* 1947 NAC (C&O) 1-2 neatly summarizes the rules governing management of property: 'All property accruing to members of the family goes into a common pool and is administered by the kraalhead [familyhead]; liabilities incurred by members of the kraal [homestead] are satisfied from such property. The family unit thus resembles a partnership of which the head of the kraal is the manager It is customary for the head to consult the major inmates of his kraal before property is alienated. If the head and the inmates cannot agree, the will of the head prevails.' See too Uzodike (n35) 89.

⁵⁰If family members have no property, it follows that the familyhead must make compensation for any delicts dependants have committed, whatever age they happen to be.

⁵¹See the South African decisions in: *Mkwanazi v Zulu* 1938 NAC (N&T) 258; *Sitole* 1945 NAC (N&T) 50 and *Kuzwayo v Khuluse* 1951 NAC 321 (NE).

⁵²See art 32 of the UN Convention and art 15 of the African Charter.

⁵³57 of 1972. See Bennett *Sourcebook* 350-5 for the position in South Africa.

In so far as customary law deprives children of control of their acquisitions, can constitutional rights be invoked to modify the situation? The relevant sections would be art 10 (which requires equality before the law) and art 16(1) (which allows every person the right to acquire and hold rights in property). While art 16(1) might be discounted, because it seems only to be applicable against the state,⁵⁴ a strong argument could be made for applying art 10(1) to parent-child relationships on the basis of the doctrine of *mittelbare Drittwirkung*. The paucity of materials on customary law and the uncertainty concerning age of majority legislation has created a situation that must be remedied by reference to the fundamental rights.

Nevertheless, a difficult argument must still be overcome: denying children control of property does not discriminate, as it does not necessarily work to the prejudice of children. After all, the common law also denies minors full proprietary capacity and it is not deemed to violate fundamental rights. A counterargument might be that customary law does not deprive children of full powers in order to *protect* them. While the common law seeks to safeguard children by preventing them from unwittingly disposing of their assets,⁵⁵ customary law denies individuals control of property in order to retain property within the family.⁵⁶ If children happen to be guarded from the consequences of youthful inexperience, the result is incidental.⁵⁷

It is still not obvious, however, whether customary law should be condemned outright, because proprietary rights are not a developed part of the system. Personal rights to support are more important. Thus customary law secured the welfare of children by obliging the heads of households to administer property under their control in the interests of children and other dependants, not by allowing individual ownership of acquisitions. To contend that a child's personal rights are inferior to real rights pushes the notion of equal treatment in art 10 of the Constitution too far.

A more helpful line of inquiry would be to rely upon the UN Convention on the Rights of the Child and to ask whether customary law serves the child's best interests. If, as it appears, customary law can work to the disadvantage of children, the answer is not necessarily to give them real rights. Instead, a child's interests may be catered for by making better provision for the administration of family estates.⁵⁸ At present, customary law gives familyheads an almost unfettered freedom to use and dispose of family property

⁵⁴See the argument in respect of women above ch VI(2)(a).

⁵⁵Thus a child over the age of 7 has the capacity to acquire ownership of property if this will improve his or her position. The guardian has only a power of administration over the ward's estate, and this power is qualified by a duty to act *bona fide* and in the child's best interests. Certain specific rules have been adopted to protect minors from inept and dishonest management, such as a prohibition against alienation of immovables. See Spiro *Law of Parent and Child* 94 and Boberg *The Law of Persons and the Family* 469-70.

⁵⁶The non-protective nature of customary law becomes apparent in the rule that children may continue to be deprived of property although they may be intellectually mature enough to deal with it.

⁵⁷A situation where protection of people deemed incapable of managing their affairs has become a process of subjugation: Eckelaar in Alston (n1) 44-5.

⁵⁸Even if customary law were changed to permit children to 'own' the property they acquire, their estates would still have to be administered by a guardian until the children were capable of taking control of their own affairs.

as they wish. Family members have no rights or procedures designed to protect their interests or to ensure proper management of the estate.⁵⁹

Customary law may need to be changed, but judicial review is not necessarily the appropriate medium. If the courts were simply to apply the Age of Majority Act to those subject to customary law, some of inequities could be remedied by putting an end to incapacities at a definite age. More, however, is needed: a system to regulate the control of family property. In this regard, legislation seems to be the most appropriate vehicle for reform, since it would place an impossible burden on the courts to demand that they manufacture ad hoc a complex new set of rules without detailed planning and discussion.⁶⁰

(c) Contractual capacity and locus standi

A child's lack of proprietary capacity is normally complemented by a corresponding lack of contractual capacity and locus standi. These incapacities have not occasioned much comment, either in Namibia or in other African countries, probably because they do not prejudice children to the same extent as deprivation of proprietary capacity. If this is the case, then to deny children the capacity to enter contracts or to sue in court does not constitute unequal treatment, because it evidently operates only to protect them from the consequences of their acts.

Nevertheless, children may be disadvantaged if they are incapacitated beyond a reasonable period of time - another situation where it would be expedient to have a fixed age for terminating the status of minority.⁶¹ In South Africa s 11(3) of the Black Administration Act provides at least a partial remedy for contractual capacity and locus standi.⁶² Children have common-law capacities - which would include the fixed-age specifications imposed by common law - to enter contracts and to sue and be sued in court in respect of rights or obligations arising out of the common law. The customary-law incapacities operate only for purposes of typically customary transactions, such as concluding a customary marriage.

Unfortunately Namibia has no similar statutory provision. On general principles of conflict of laws, however, it could be argued that if the main claim is governed by common law then subsidiary matters of capacity should be regulated by the same system.⁶³

⁵⁹Customary law was predicated on simple, pre-capitalist economics, when the effective running of a household did not require particular financial and managerial skills. Obviously, more is now demanded of the modern familyhead.

⁶⁰For example, to establish the precise modalities of how family property is to be administered. Ghana might provide a model for future reform. Here customary law was superseded by the Head of the Family Accountability Act in 1985. See Daniels (1987) 31 *JAL* 103ff and Kludze (1987) 31 *JAL* 107ff.

⁶¹Which could be achieved simply by ruling that the Age of Majority Act 57 of 1972 applies to persons subject to customary law.

⁶²38 of 1927.

⁶³Bennett *Sourcebook* 129.

(d) Custody and guardianship

In patrilineal societies, provided bridewealth obligations have been complied with, the husband and his family have full parental rights to any children born to a wife during marriage.⁶⁴ Amongst the Herero, for instance, children used to remain with their father on divorce.⁶⁵ In matrilineal societies, the mother's family (and especially her brother) has a preferent right to the children.⁶⁶ In Caprivi children belong to both families, but on divorce they usually remain with the father.⁶⁷ In all cases, because termination of marriage and the parent-child relationship are private matters, the families concerned are free to vary customary rules if they wish.⁶⁸

In South Africa, the courts work on an assumption that, because all systems of customary law are patrilineal, fathers will retain their children on divorce.⁶⁹ But, when making *custody* orders, they insist that the child's best interests prevail.⁷⁰ Introducing this common-law principle into customary law had two implications. The first was that any arrangement smacking of the sale of a child would not be enforced.⁷¹ Secondly, while custody was mediated by the child's best interests, *guardianship* continued to be decided by customary law.⁷² Thus a mother's right to custody entitled her to no more than the child's physical presence; the father was still entitled to whatever economic advantages accrue to the child.⁷³

There is no need to confine the child's best interests to issues of custody. The UN Convention,⁷⁴ provides authority for extending the rule to cover all aspects of parental

⁶⁴Armstrong in Alston (n1) 174. See, too, the South African cases: *Mokoena v Mofokeng* 1945 NAC (C&O) 89 and *Kabe & another v Inganga* 1954 NAC 220 (C).

⁶⁵The position today, however, is unclear: Becker & Hinz (n42) 88. Despite the influence of the matriline, fathers usually control their upbringing.

⁶⁶Becker & Hinz (n42) 74-5 note that the father's authority was not entirely excluded, since he was head of the household. With cognatic systems in Caprivi, however, children belong to both families, although there is preference for the father's: Becker & Hinz (n42) 92.

⁶⁷Bridewealth does not function so much to affiliate children to a family as to declare the validity of marriage: Becker & Hinz (n42) 96 and 104. Rules about guardianship are, however, flexible, allowing children a wide measure of choice: Becker & Hinz (n42) 105.

⁶⁸See Bennett *Sourcebook* 289ff citing Hollcman *Shona Customary Law* 296-7, 306-7 and 314.

⁶⁹And in this regard they recognize the significance of bridewealth. See, for instance, *Radoyi v Ncetezo* 2 NAC 174 (1911) and *Matsupelele v Nombakuse* 1937 NAC (C&O) 163.

⁷⁰*Mkize* 1951 NAC 336 (NE) and *Msiza & another v Msiza* 1980 AC 185 (C) at 191. See further Uzodike (n9) 282ff for the position in Nigeria. The concept of custody is highly flexible: a child will be said to be in the custody of its father if it happens to be at the father's homestead, even though the father is absent as a migrant worker. Conversely, no woman would ever be said to have custody unless she were to have day-to-day contact with the child. See Armstrong in Alston (n1) 170-1.

⁷¹For example, the courts have held contracts by natural parents to surrender custody of children against payment of a consideration void under the repugnancy proviso. See the cases cited in Bennett *Application* 82-3.

⁷²See *Tshabalala v Gracy* 1943 NAC (C&O) 60 and *Nkosi v Dhlamini* 1955 NAC 27 (C).

⁷³Such as receiving bridewealth for a daughter.

⁷⁴Article 3(1).

care, and the courts would doubtless accept this proposal, as it is already in line with public policy.⁷⁵

(e) Discipline and initiation

What might be thought harmful abuse in the common law, could well be regarded reasonable chastisement in customary law.⁷⁶ In other words, the limits of a parent's power to correct his or her child are culturally defined.

African thinking on parental power tends to be conditioned by a belief that children are wayward and irresponsible and hence in need of discipline.⁷⁷ By contrast, western thinking (which has been profoundly affected by developmental psychology) emphasizes the vulnerability of children, with a consequent need for protection, and a child's right to self-determination.⁷⁸ The common law accordingly interprets parental powers restrictively in favour of the child.⁷⁹ It follows that a child's best interests must always be the overriding consideration,⁸⁰ and a child who is old enough must be allowed to express considered opinions to decide his or her own future.

The question now arises whether the fundamental rights should be interpreted to express these common-law views in preference to African ideas about proper child-rearing. Certain provisions of ch 3 might suggest a leaning towards the common law. Subarticle (1) of art 8, for example, provides that 'The dignity of all persons shall be inviolable' (support for the child's self-determination) and subart (2) provides that 'no persons shall be subject to ... cruel, inhuman or degrading treatment or punishment' (support for a limitation on disciplinary powers).

Closer inspection of the terms used in these provisions, however, reveals that they are too broad to register a leaning in favour of either customary or common law. What is more, art 8 of the Constitution may not be horizontally applicable, for the wording gives no indication one way or the other (although Namibia's obligations under the UN

⁷⁵Yet, as Rwezaura and Armstrong in Alston (n1) 105-6 and 165 and 185 say, poverty has a pronounced effect on deciding who has custody of a child, for the child's material prospects are nearly always better if he or she remains with the father. This result occurs because the person with custody is normally obliged to shoulder the full burden of educating the child, and, because women are in a worse financial position than men, they can seldom offer their children the benefits a father could. Rwezaura and Banda in Alston (n1) 108 and 196 also note that although women may be entitled to custody it is pointless for them to claim it, if they cannot at the same time obtain maintenance. Even when women do receive maintenance the amounts awarded are so low and the level of compliance so poor, that they ultimately have to bear the costs of child-rearing alone. Cf Armstrong in Alston (n1) 160.

⁷⁶Uzodike (n35) 84-5 defines child-abuse as the deliberate use of force (or deliberate neglect) by a parent or custodian aimed at injuring the child.

⁷⁷Bennett *Sourcebook* 346ff. Thompson (1991) 5 *Int J Law & Family* 15-16 says that, although in general customary law did not contemplate parents or guardians committing offences against children, parental authority was conceived 'in almost absolute and exclusive terms'.

⁷⁸Article 12 of the UN Convention and art 7 of the African Charter.

⁷⁹Dickens (1981) 97 *LQR* 462 and Freeman *The Rights and Wrongs of Children* 1.

⁸⁰The inspiration behind international conventions on children. See art 3 of the UN Convention and art 4 of the African Charter.

Convention on the Rights of the Child⁸¹ might suggest otherwise). This seems to be a situation where 'the social conditions, experiences and perceptions of the people of [Namibia]' are relevant to naturalizing abstract human rights to the circumstances of the country.⁸²

Where exercise of disciplinary powers amounts to an infraction of the criminal law, however, customary law must obviously give way.⁸³ Initiation - an occasion when parents submit their offspring to painful and humiliating rites that are intended to transform the children into adults - is a particular case in point. While initiation is no longer considered an absolutely essential rite of passage, it is still practised.⁸⁴ No objection has been raised to the institution in principle, but, where it entails the infliction of serious bodily harm, courts in South Africa have readily invoked criminal liability.⁸⁵ (The victim's consent provided no defence.)⁸⁶ The courts' attitude was consistent with their broader policy to uphold the common law of crime no matter what cultural approval an offending act may enjoy.⁸⁷

A Canadian case, *Thomas v Norris*,⁸⁸ reached a similar conclusion on different grounds: the relationship between individual rights and a group's right to pursue its culture. The plaintiff had been 'grabbed' by the defendants, detained in a long house for four days and forced to undergo an initiation ceremony of spirit dancing. In common-law terms, his experience was tantamount to assault, battery and unlawful imprisonment. On the ground that his fundamental rights had been contravened, the plaintiff sued for damages arising out of tort.

⁸¹ Articles 18(1) and 19(1) would be relevant in this regard, but again the terms used are similar to those in the Namibian Constitution, which does not advance the argument.

⁸² *Ex parte A-G of Namibia: in re corporal punishment by Organs of State* 1991 (3) SA 76 (NmSC) at 95-6.

⁸³ An argument could be constructed in terms of freedoms and rights, namely, that parents have a freedom to raise their children in any manner they see fit, but the freedom must give way to individual rights. See above ch III(3)(b).

⁸⁴ See Becker & Hinz (n42) 57 regarding female initiation rites in Owambo. Boys in Owambo and Kavango no longer undergo initiation.

⁸⁵ *R v Njikelana* 1925 EDL 204. Cf *S v Sikonyana* 1961 (3) SA 549 (E) at 551 (where exorcism was contrasted with surgery): 'Any intentional act which involves the likelihood of bodily harm to another and which is not recognised by modern usage as a normal and acceptable practice of society is forbidden by law and is in no way dependent upon the absence of consent on the part of the victim.' As far as criminal liability is concerned, 'acceptable practice of South African society' has never been determined by African norms.

⁸⁶ *R v Matomana* 1938 EDL 128 at 131, for example, held that it would be contrary to public interests to excuse a death resulting from stick fighting on the ground of consent.

⁸⁷ *Pack v Muundjua & others; Tjipetekera v Muundjua & others* 1989 (3) SA 556 (SWA) at 564 also held that the common-law of crime overrides customary law. See, too, *R v Swartbooi* 1916 EDL 170, *R v Mane* 1948 (1) SA 196 (E) and *Phiri v R* 1963 R&N 395 (SR). *S v Sita* 1954 (4) SA 20 (E) at 22 held that custom cannot override the common law, no matter whether the custom is legal or illegal.

⁸⁸ [1992] 2 CNLR 139 (BCSC). See discussion in Isaac (1992) 21 *Manitoba LJ* 618.

The defendants contended that because spirit dancing was an 'existing Aboriginal right' it fell under s 35(1) of the Canadian Charter of Rights⁸⁹ and for that reason was exempted from application of the fundamental rights contained in the Charter.⁹⁰ The court's reply to this argument was to hold (unfortunately on not very convincing grounds) that the aboriginal right had been extinguished,⁹¹ since it involved conduct incompatible with the introduction of English criminal law.⁹² Hood J's other reasons for preferring the plaintiff's individual rights are more plausible. He felt that the use of force, assault, battery, and wrongful imprisonment, all of which were entailed in spirit dancing, were opposed to a peaceful society committed to protecting the rights and freedoms of all.⁹³ He also noted that aboriginal rights were not absolute. They were limited by both the civil and criminal law, which had the function of ensuring that the exercise of one person's freedom did not injure the rights of another.⁹⁴

Perhaps the most telling part of the judgment was a finding that the plaintiff was free to believe in and practise any religion or tradition he chose. A group purporting to exercise its collective rights to culture was not entitled to coerce him into participating.⁹⁵ Article 19 of the Constitution supports a similar argument: while all people have the right to participate in the cultural life of their choice, individuals are always free to opt out. It follows that no child may be compelled to undergo initiation against his or her will.⁹⁶

⁸⁹The Court held that the defendants could not have relied on s 25 of the Charter (which would have guaranteed them the right to spirit dance as a freedom of religion), because the Charter does not apply to actions between private parties unless the government is involved. See *Retail, Wholesale & Department Store Union Local 580 v Dolphin Delivery* (1987) 33 D.L.R. (4th) 174, above ch IV(2)(c).

⁹⁰One of Hood J's answers to this (at 155) was to concede that, although spirit dancing was a *current* religious tradition amongst the Coast Salish people, the defendants had not proved it to be an 'existing Aboriginal right' as required by s 35.

⁹¹At 156. According to established precedent, notably *R v Sparrow* (1990) 70 D.L.R. (4th) 385 at 401, extinguishment of aboriginal rights is possible only where the Crown had shown a 'clear and plain intention' to override them. In *Norris's case* extinguishment was possible only by general reference or mere inference. In consequence, the decision is arguably wrong on this score.

⁹²Interestingly enough, Hood J had no difficulty (at 156) in finding that civil wrongs could also override aboriginal rights, for they had the same purpose as the criminal law, i.e. to protect citizens from wrongful conduct. See Isaac (n88) 624-5.

⁹³At 161.

⁹⁴At 160. This argument is consonant with art 19 of the Constitution, which subjects the right to culture to 'the rights of others'.

⁹⁵At 162. Isaac (n88) 627 says that this does not deny the aboriginal right to practise spirit dancing. It merely sets a limit on the extent to which spirit dancing may inflict harm on others within a community.

⁹⁶Note, too, that art 21 of the African Charter prohibits harmful cultural practices that might be prejudicial to the child's health or life.

(f) Legitimacy

Most legal systems stigmatize the offspring of temporary sexual liaisons or other proscribed forms of cohabitation as illegitimate. Such children may then be penalized in various ways, typically by being denied rights to succession and maintenance.⁹⁷

Systems of African customary law were said to be an exception, for it was claimed that 'birth in or out of wedlock is irrelevant to [the child's] status in the community or its legal rights and duties'.⁹⁸ Admittedly, the legal disadvantages of illegitimacy are not as great in customary law as they used to be in the common law, and it is also true that 'lawful wedlock' (which was critical to defining the status of illegitimacy in common law) has little relevance in customary law. But in patrilineal systems bridewealth does. If it has been paid, the children have a secure status in their father's family as 'legitimate' offspring; if it has not been paid, they belong to their mother's family.⁹⁹

Illegitimate children suffer few disadvantages under customary law. A child would not, for example, be denied support. Natural fathers usually have no obligation to maintain their progeny, but such children are incorporated into their mother's household where they have an assured upbringing.¹⁰⁰ In the traditional version of customary law, only boys suffered from the stigma of illegitimacy, and then only to the extent that they were not allowed to inherit if a deceased had legitimate male descendants.¹⁰¹

The discrimination suffered by illegitimate children was an obvious target for the international children's rights movement,¹⁰² and art 10 of the Constitution would be relevant to incorporating international norms into Namibian law. Unfortunately, subart (2) does not specifically prohibit discrimination on the ground of birth, but it does ban discrimination on the ground of 'social status'. The only remaining obstacle to applying art 10 is the question of horizontality. If we take into account the need to read art 10 in conjunction with the rule making a child's best interests the paramount consideration,

⁹⁷See Krause (1976) 4 *IECL* ch 6 s2.

⁹⁸Cotran & Rubin *Readings in African Law* vol2 44.

⁹⁹These rules were designed to forestall conflicts between the families, however: they were not conceived to be in the interests of the child concerned: Bennett *Sourcebook* 359.

¹⁰⁰The accommodating attitude of customary law depended, of course, on a subsistence economy and few material wants. When expectations rise and the cost of educating and supporting children increases, feelings of liberality towards child-rearing disappear. Bennett *Sourcebook* 361. The general instability of marriage has also contributed to the growing number of illegitimate births. See Burman (1991) 7 *SAJHR* 215.

¹⁰¹Because the customary system of succession was intended to maintain the purity of the bloodline, an illegitimate offspring could not succeed to a deceased familyhead. See Poulter *Family Law and Litigation in Basotho Society* 230 and 235-6, Hunter *Reaction to Conquest* 209 and 233 and Marwick *The Swazi* 92. In addition, 'illegitimate' children would not be entitled to claim assistance from the familyhead in providing their bridewealth when they married. See Holleman *Shona Customary Law* 252-9 and Nhlapo in Eekelaar & Sarcevic (n2) 39-40.

¹⁰²Hence Principle 1 of the GA Declaration, art 2 of the UN Convention, and art 3 of the African Charter contain a norm of non-discrimination that entails abolition of the status of illegitimacy. All children are entitled to enjoy rights guaranteed in the instruments irrespective of birth or status.

however, then an cogent argument could be made in favour of application in the domestic sphere.

VIII MARRIAGE AND SUCCESSION

1 RECOGNITION OF CUSTOMARY MARRIAGE

Profound differences separate customary and civil or Christian marriages.¹ For instance, while a civil/Christian union is exclusively the concern of the spouses and depends for its validity on their consent, a customary marriage is an alliance of two families, for which the co-operation of the spouses was traditionally considered desirable but not essential. Civil and Christian marriages involve intervention by a higher authority: to be validly married the spouses must exchange vows before a marriage officer or priest, and to be divorced they must obtain an order from a court of competent jurisdiction. African marriages are private affairs: both creation and dissolution are managed by the families concerned.²

Perhaps the most characteristic, and certainly the most controversial features of customary marriages are the husband's right to contract polygynous unions and a duty to pay bridewealth. On grounds of these two practices the Church and the colonial state persistently denied African marriages full recognition.³ Namibia inherited the South African prejudice in this regard.⁴

The first intimation of recognition came in 1928, when the Native Administration Proclamation 15 made the provisions of South Africa's Native Administration Act 38 of 1927 applicable to marriages contracted by Africans in the 'police zone'. Customary marriages were still deemed to be subordinate to civil/Christian unions,⁵ although the consequences of this ranking were not fully spelled out - unlike South Africa where the inferior status of customary marriage meant that a civil/Christian union could override and all but extinguish it.⁶

¹ See Phillips *Survey of African Marriage and Family Life* xi-xvii and Bennett *Sourcebook* 167ff. These differences remain encoded in ss 17 and 18 of the Native Administration Proc 15 of 1928, provisions that were specifically saved by s 16 of the Traditional Authorities Act 17 of 1995.

² From the private nature of a customary marriage, it follows that inception and termination cannot be precisely fixed by reference to state-controlled ceremonies. The union is best considered a process, one that begins with the founding of a new household, and then over time, with the payment of bridewealth and the birth of children, gains greater social recognition: Armstrong et al (1993) 7 *Int J Law & Family* 317-18.

³ See Simons 1961 *Acta Juridica* 17-19, Hastings *Christian Marriage in Africa* 15 and Reuter *Native Marriages in South Africa* 313. The 'true' marriage was defined in *Hyde v Hyde & Another* (1866) LR 1 PD 130 at 133 as a 'voluntary union for life of one man and one woman to the exclusion of all others'. This definition was accepted into Roman-Dutch law by *Seedat's Executors v The Master (Natal)* 1917 AD 302 at 307-8.

⁴ Becker & Hinz *Marriage and Customary Law in Namibia* 30 and 106.

⁵ Notably ss 17 (which dealt with the relationship between civil/Christian and customary unions) and 25 (which defined customary unions).

⁶ See Peart (1983) 16 *CILSA* 39ff and Kaganas & Murray 1991 *Acta Juridica* 119-25. Proclamation 21 of 1919 introduced the Roman-Dutch marriage to Namibia. Thereafter the same regulations regarding civil/Christian marriages as those in South Africa were imposed by the Solemnization of Marriages Ord 31 of 1920. The Marriage Amendment Act 51 of 1970 introduced the

To continue refusing customary marriages full recognition is to negate 'the real life situation of the majority of Namibians whose day-to-day life is governed by customary law'.⁷ In constitutional terms this attitude amounts to a denial of the right to culture.⁸ Implicit in art 19 of the Constitution - the right of all Namibians to participate in the culture of their choice - is a duty on the state to afford equal recognition to the institutions associated with the various cultures in its society.⁹

If customary and civil marriages are to be afforded equal recognition, and if both are to be subject to constitutional norms protecting human rights, the effect will be to construct a set of minimum standards applicable to all marriages in the country.¹⁰ It may seem contradictory to encourage cultural separateness on the one hand and to insist on a national standard of treatment on the other,¹¹ but the conflict is more apparent than real. Regardless of the cultural provenance of a particular marriage, spouses experience certain common social problems, and it is these problems that a uniform code of law should seek to remedy.¹²

Thus, while a uniform code will establish some norms as binding on all marriages, spouses should still be free to choose a form of marriage appropriate to their cultural orientation. (In the normal course, the nature of a marriage is established by the rites used and the parties' intention.)¹³ From the nature of the union, certain rights and duties will be fixed according to customary law or the common law, as the case may be.

Many people, of course, deliberately avoid marriage in order to escape its legal and social implications.¹⁴ It is much more difficult to subject these informal relationships

South African Marriage Act 25 of 1961 and the Matrimonial Affairs Ord 25 of 1955 introduced the South African Matrimonial Affairs Act 37 of 1953.

⁷ Becker & Hinz (n4) 113. And it should be appreciated that, despite the high percentage of marriages celebrated in church, most people (in Owambo at least) marry both by customary and common law: Becker & Hinz (n4) 54. Cf Caprivi: Becker & Hinz (n4) 91.

⁸ And is possibly even tantamount to discrimination on the ground of ethnic origin under art 10(2) of the Constitution, an argument that would be supported by the overtly racist wording of Proc 15 of 1928.

⁹ Although art 66(1) deems both common and customary law valid to the extent that they have not been overridden by the Constitution or statute, it is too weak a basis to construct a doctrine of equal recognition of marriages. Article 4(3)(b) of the Constitution deems customary marriage to be the same as a civil or Christian marriage for purposes of obtaining citizenship, but it, too, is a weak basis on which to build a doctrine of recognition. See Becker & Hinz (n4) 111.

¹⁰ A suggestion made by Chanock 1991 *Acta Juridica* 64ff.

¹¹ In other words to merge two cultures in a single code of matrimonial law.

¹² Commonly experienced socio-economic problems give rise to similar legal issues, a point that has been stressed by comparative and socio-legal studies, notably, Glendon *State, Law and Family* (1977) and *The New Family and the New Property* (1981). Thus it is argued that the de facto or informal union should be the point of departure for discovering solutions. See, for example, Sachs (1984) 28 *JAL* 103.

¹³ There is no reason, however, why the spouses should be permanently bound by their choice. Under s 11(2) of the Tanzanian Law of Marriage Act 5 of 1971, for instance, the nature of a marriage can be changed by a joint declaration of both parties before a judge or magistrate.

¹⁴ Becker & Hinz (n4) 78. A somewhat different issue is the problem of informal promiscuous unions contracted by men, whether they are married or not, with any number of women. This is a common social phenomenon encouraged by male promiscuity: Becker & Hinz (n4) 98.

to human rights norms, because they are not marriages in the strict sense.¹⁵ The debate about what obligations to impose in these circumstances cannot be pursued here, but equality/non-discrimination norms contained in art 10 of the Constitution would clearly be relevant.

2 FORMATION OF MARRIAGE

(a) The right/freedom to marry

Article 14(1) of the Constitution provides a fundamental right to marry:

*'Men and women of full age, without any limitation due to race, colour, ethnic origin, nationality, religion, creed or social or economic status shall have the right to marry and to found a family.'*¹⁶

Aside from the Constitution, two other sources for this right exist in the Convention on Elimination of All Forms of Discrimination against Women (CEDAW) contains provisions relevant to women's rights¹⁷ and public policy.¹⁸

(b) Consent of the spouses

Article 14(2) of the Constitution provides that: 'Marriage shall be entered into only with the free and full consent of the intending spouses.' This rule is also well established in international human rights law¹⁹ and southern African courts have always held that, if customary law allowed forced marriages,²⁰ it should not on the ground of public policy be applied.²¹

¹⁵Becker & Hinz (n4) 63.

¹⁶And subart (3) provides that: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.'

¹⁷Because Namibia has ratified the Convention, it is obliged to modify its municipal law accordingly. See above ch VI(1).

¹⁸Thus *Rattigan & others v Chief Immigration Officer & others* 1995 (1) BCLR 1 (ZS) at 7 held that marriage is a fundamental right and maintenance of it a public interest.

The following provisions from international instruments confirm various aspects of the public policy underlying provisions of the common law. Article 16 of the UN Declaration on Human Rights and arts 10 and 23 of the International Covenants on Economic, Social and Cultural Rights and Civil and Political Rights (respectively) secure the right to marry and the need for spousal consent. The Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962) deals with the matters contained in its title.

¹⁹See art 16(2) of the Universal Declaration of Human Rights, art 23(3) of the Covenant on Civil and Political Rights, art 10(1) of the Covenant on Economic, Social and Cultural Rights and art 16(1)(b) of CEDAW.

²⁰Which may well happen where marriage is arranged by the families of the spouses rather than the spouses themselves. Forced marriage is not a feature of all systems of customary law, however. In Owambo, for instance, young men and women have considerable freedom to arrange their own marriages: Becker & Hinz (n4) 58.

²¹See Becker & Hinz (n4) 56 regarding Owambo. In this respect, the courts invoked the repugnant proviso: Peart 1982 *Acta Juridica* 110-12.

The problem is not so much with the *principle* of spousal consent as with the manner in which consent is to be interpreted. In other words, what degree of duress would be necessary to invalidate a union? Under the common law, only a reasonably held fear of force (or threat of force) of such a degree as to vitiate consent suffices. *Metus reverentialis* - the fear of offending a parent or superior - is not enough.²² Yet a narrow understanding of duress - that the woman was in 'immediate danger ... to life, limb or liberty'²³ - would obviously cater for very few cases, for women are seldom driven into marriage by overt threats of physical violence.²⁴ A broader approach, more in keeping with the principle of establishing a full and informed consent, would be to interpret duress as any form of pressure that overbears the will.²⁵

(c) Parental consent

The family's power to arrange the marriages of its children is synonymous with the African cultural tradition. Especially in patrilineal societies, where bridewealth is an important feature of marriage, the bride's guardian may play a pivotal role. He can prevent or delay his daughter's union by refusing the bridewealth offered,²⁶ by making unreasonable demands or by accepting a more attractive offer from another suitor. Because of their subordinate position,²⁷ daughters can do little to combat these tactics.²⁸

Whether spouses are free to contract a customary marriage without their guardians' support is governed by art 14(1) of the Constitution, which provides that men and women of full age 'without any limitation due to ... ethnic origin ... social or economic status shall have the right to marry ...'. The only question is whether this article is applicable in private relationships.²⁹ The answer is obviously that it should be. Not only is

²² According to Hahlo *The South African Law of Husband and Wife* 83-4, the test is both subjective and objective.

²³ *Singh* [1971] P 226 and *Singh v Kaur* (1981) 11 Fam LR 152.

²⁴ Everyone appreciates that forced unions are difficult to sustain, because when, as inevitably happens, problems later surface the entire family then suffers the repercussions: Bennett *Sourcebook* 175.

²⁵ Hence a threat of ostracism from the community might suffice: *Hirani* (1983) 4 Fam LR 232. See Nhlapo *Marriage and Divorce in Swazi Law and Custom* 53-6, who considers the problem of ascertaining whether a wife genuinely consented to her marriage.

²⁶ Where the amount of bridewealth is fixed, as with the Herero, such tactics are not possible: Becker & Hinz (n4) 82. In Caprivi, where the amount is at the discretion of the bride's parents, however, informants claim that women are free to marry whomever they choose: Becker & Hinz (n4) 94 and 96.

²⁷ Cf Becker & Hinz (n4) 81 for the Herero.

²⁸ Apart from the time-honoured method of eloping. See Bennett *Sourcebook* 188-92 for 'irregular' methods of initiating marriage.

²⁹ It is true, of course, that a couple can avoid the need to obtain the bride's guardian's consent by contracting a civil or Christian union (provided they are not under age: Bennett *Sourcebook* 179) but the question of principle remains: should persons of marriageable age be entitled to marry regardless of their guardians' views?

freedom to marry an accepted rule of international law,³⁰ including CEDAW,³¹ but it is also a long-established feature of public policy.³²

Freedom of marriage is restricted, however, to persons who are 'of full age', ie old enough to understand the consequences of their act. The problem in this regard is that customary law does not prescribe a fixed age of competence. Prospective spouses have merely to be physically and intellectually capable of sustaining the relationship,³³ and women of course tend to be more pliable to their guardians' wishes than men.³⁴

A straightforward solution to this and other similar problems would be to apply the Age of Majority Act to persons living according to customary law. It could, alternatively, be argued that customary law is in conflict with fundamental rights, ie the freedom to marry and the prohibition on discrimination,³⁵ but this argument is the more difficult route to follow, since a minimum age for marriage hardly qualifies as a human rights issue.³⁶

(d) Formalities

While registration is essential for civil and Christian marriages, no formalities are necessary for customary unions. An African man intending to contract a civil or Christian marriage, however, must declare to the marriage officer whether he has a subsisting customary union.³⁷ Since the declaration is probably supposed to remind prospective hus-

³⁰ See the international instruments cited in footnote 18 above. A world-wide trend has been away from parents controlling their children's marriages to parents merely approving and ratifying a match already made by a child. This shift can be explained partly by the breakdown of the extended family and erosion of parental authority and partly by a change in the conception of guardianship, ie that it should operate for the benefit of the ward, not for the benefit of the guardian or the child's family.

³¹ Article 16(1)(a) and (b) provides that states parties must ensure that men and women have the same rights to enter into marriage with the spouse of their choice.

³² At least as far as the common law is concerned. See, for example, *Barclays Bank DC&O NO v Anderson* 1959 (2) SA 478 (T).

³³ Becker & Hinz (n4) 56 note that in Owambo marriage could never be consummated before puberty, and (at 57) in Kavango and Herero (at 80) marriageable age depended on whether boys were old enough to fulfil their roles as husbands and fathers. See Becker & Hinz (n4) 93 for Caprivi. Article 15 of the Constitution prescribes age limits of 16 (for subsections (2) and (5)) and 14 (for subsection (3)), but these ages apply only for the purposes of the article, and they are out of keeping with art 1 of the UN Convention on the Rights of the Child, which defines children as persons under the age of 18.

³⁴ In terms of South African cases - *Gcina v Ntengo* 1935 NAC (C&O) 21 and *Dlomo v Mahodi* 1946 NAC (C&O) 61 - a woman's guardian can indefinitely postpone her marriage for his own venal or unscrupulous ends, no matter what age she happens to be.

³⁵ Namely, women should have the same freedom to marry as men.

³⁶ Although art 16(2) of CEDAW requires states parties to take legislative action to specify a uniform minimum age for marriage, they do not stipulate what the age should be.

³⁷ Section 17(1) of Proc 15 of 1928 provides that: 'No male native shall, during the subsistence of any customary union between him and any woman, contract a marriage with any other woman unless he has first declared upon oath, before the magistrate of the district in which he is domiciled, the name of every such first-mentioned woman, the name of every child of any such customary union, the nature and amount of the movable property (if any) allotted by him to each such

bands that civil/Christian marriage does not allow polygyny, it cannot be said to contravene a constitutional norm of non-discrimination between the sexes. The effect of failing to make such a statement or making a false one is, however, obscure.³⁸

CEDAW requires the registration of all marriages.³⁹ Arguably this requirement is too stringent. That spouses are entitled to have the status of their union made certain may be implicit in the freedom to marry, but the nature of the formalities entailed can hardly be said to impinge on fundamental human rights. Systems of municipal law should be free to implement the spouses' entitlement in any way they think best.⁴⁰ Nor can the difference in the formalities required of civil/Christian and customary marriages be said to constitute discrimination; rather the difference signifies tolerance of cultural pluralism.⁴¹

(e) Bridewealth

Bridewealth, the giving of a valuable consideration by the groom or his family to the bride's family in order to acquire the woman's reproductive capacity, is not a major feature of all systems of customary law in Namibia. In matrilineal societies marriage is accompanied by a number of small gifts, and, as in Kavango, the husband was obliged to work for his wife's family during the engagement and in the early years his marriage.⁴² It is only

woman or house under native custom, and such other information relating to any such union as the said official may require.'

Section 17(3) provides that: 'No minister of the Christian religion ... nor any marriage officer, shall solemnize the marriage of any native male person unless he has first taken from such a person a declaration as to whether there is subsisting at the time any customary union between such person and any woman other than the woman to whom he is to be married and, in the event of any such union subsisting, unless there is produced to him by such person a certificate under the hand of a magistrate that the provisions of this section herein before set out have been duly complied with.'

³⁸ While there is good authority - *Malaza v Mndaweni* 1975 BAC 45 (C) at 55-6 - for arguing that the validity of the marriage is unaffected, under s 17(4) and (5) both the prospective husband and the marriage officer will be deemed to have committed criminal offences if they do not perform this formality.

³⁹ Article 16(2). Article 3 of and the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages has the same requirement. It is questionable, however, whether the imposition of a formal requirement such as registration is a wise move, since the rule usually has the effect of depriving existing unions of whatever limited validity they might enjoy: Parker (1987) 1 *Int J Law & Family* 133ff. Furthermore, experience in South Africa with s 31(2) of the Black Laws Amendment Act 76 of 1963 (which requires certification of customary marriages for purposes of claims for damages for death of a breadwinner) shows that registration/certification can lead to unwarranted technicality. See, for example, *Dlikilili v Federated Insurance Co Ltd* 1983 (2) SA 275 (C) at 283.

⁴⁰ It follows that, in spite of a long and inconclusive debate, registration of customary unions should be viewed as merely one means to a broadly conceived end. On this debate see: Shropshire *Primitive Marriage and European Law* ch 3.

⁴¹ People who regard family approval and bridewealth as the critical elements of marriage would see little point in state-imposed formalities. See Simons 1958 *Acta Juridica* 341.

⁴² See Becker & Hinz (n4) 59 and 60-1 regarding the 'bride-service' required in Kavango and the giving of gifts in Owambo. The wedding ox commonly given in Owambo, although referred to as 'lobola', does not perform the same function as bridewealth. For Kavango see Gibson, Larson & McGurk *The Kavango Peoples* 57-8. This practice is associated with an uxorilocal residence pattern at the initial stage of marriage.

in patrilineal societies, such as the Herero,⁴³ and amongst the peoples of Caprivi,⁴⁴ that bridewealth is an important ingredient of a valid marriage.⁴⁵

According to feminists in all parts of Africa, bridewealth conduces to the inferior status of women,⁴⁶ and it must be conceded that at a superficial level the payment of an often substantial amount of livestock or cash in exchange for a bride does have all the makings of the sale of a woman.⁴⁷ What is more, by talking about bridewealth as the quid pro quo for acquiring rights over their wives, men do nothing to dispel this image. But these are matters of symbolism. The practice of giving bridewealth may have a more concrete effect on individual freedom by binding a wife to an unwanted marriage: if she seeks a divorce, her family is usually obliged to return bridewealth, and rather than do so they may force her to put up with an unhappy relationship.⁴⁸

Nevertheless, paying bridewealth does not directly involve less favourable treatment for wives than husbands - after all men have to pay, not women. Hence any contention of discrimination under art 10(2) of the Constitution would fail. An alternative would be the difficult argument of *indirect* discrimination. In terms of this concept, it is accepted that, although a practice may *appear* to be gender-blind, the way in which it has operated over time has worked to the detriment of women.⁴⁹ The inquiry accordingly shifts from a specific act of prejudice to the long-term effect that a practice may have had upon women as a group.⁵⁰ Again, the trouble with this argument would be proving that

⁴³ Bridewealth (a fixed amount) has the effect of legalizing the marriage and establishing patrilineal affiliation of any children born. The wife, however, remained part of her own matriline: see Becker & Hinz (n4) 81-2.

⁴⁴ In these societies the amount given as bridewealth tends to be large (in relation to the parties' wealth) and is usually decisive in entitling the husband to rights over his wife and her children. By contrast, in matrilineal societies, the amount given is much smaller and the consideration does not function to transfer the wife and children to the husband's family, for they remain part of the woman's matriline. For this reason Becker & Hinz (n4) 51 prefer to talk of a 'marriage ratification custom'. See Becker & Hinz (n4) 94ff for Caprivi, where the giving of bridewealth was introduced during the period of Lozi rule.

⁴⁵ Elsewhere this time-honoured practice gives the union a distinctively African character: Whooley in Verryn *Church and Marriage in Modern Africa* 313 and Dlamini *A Juridical Analysis and Critical Evaluation of Ilobolo in a Changing Zulu Society* 198.

⁴⁶ See Becker & Hinz (n4) 6. For Zimbabwe and South Africa, see Chinyenze (1983-4) 1/2 *Zimbabwe LR* 229 and Hlophe (1984) 17 *CILSA* 168-70, respectively.

⁴⁷ Especially in Caprivi, where the idea has arisen that bridewealth is given to compensate the bride's parents: Becker & Hinz (n4) 97. *Meesadoosa v Links* 1915 TPD 357 at 359 held that bridewealth could not be tolerated because 'a woman is in every respect the legal equal of a man according to our civilised customs'. See Chigwedere *Lobola - the Pros and Cons* for a general debate about the institution.

⁴⁸ Armstrong et al (n2) 340.

⁴⁹ See Albertyn & Kentridge (1994) 10 *SAJHR* 164-7. The notion of indirect discrimination has only recently entered western systems of law: in the United States via the Supreme Court decision in *Griggs v Duke Power Co* 401 US 424 (1971), in the United Kingdom via the Sex Discrimination Act 1975 (O'Donovan & Szyszczak *Equality and Sex Discrimination Law* ch 4) and in the European Union via jurisprudence of the European Court (Pannick *Sex Discrimination Law* 39 fn48).

⁵⁰ As the United States Supreme Court said in *Griggs's* case *supra*, the complainant must show that the practice complained of had an adverse impact upon women in comparison with other

payment of bridewealth was a condition precedent to the unfavourable treatment of wives. This is an extraordinarily complex, if not impossible task, especially in view of a substantial literature claiming that bridewealth functions to benefit women.⁵¹

Any prohibition on bridewealth would in any case be highly inadvisable. Surveys elsewhere indicate that whatever its drawbacks people remain deeply attached to the institution,⁵² and laws that have attempted to ban it or to restrict the amount payable have proved easy to circumvent.⁵³ Conversely, there is no reason why bridewealth should be allowed to interfere with the spouses' enjoyment of their fundamental rights, in the sense that payment or non-payment should not affect the validity of marriage, dictate the spouses' marital obligations or determine rights to children. To deprive bridewealth of its central role in customary marriage may compromise its significance as a cultural institution, but this is a situation where a freedom to pursue a culture has to be subordinated to individual rights.⁵⁴

3 SPOUSAL RELATIONS

(a) Polygyny

A perennially controversial question in Africa has been a husband's right to take more than one wife. Although polygyny has long been condemned on moral and theological grounds, the current, more secular objection is that it degrades the status of women.⁵⁵

Any campaign to ban or restrict the practice of polygyny would now rest on the norm of equal treatment/non-discrimination under art 10 of the Constitution. Yet, as with bridewealth, it would be difficult to prove that polygyny is a direct cause of female subordination,⁵⁶ especially in view of arguments that polygyny performs the valuable social functions of absorbing women into domestic units and preventing breakdown of marriage on grounds of adultery.⁵⁷ Furthermore, only the first wife of a customary marriage may be compelled to submit to polygynous unions against her will; the subsequent

groups. The burden then shifts to the respondent to show a manifest relationship between the practice and the goal it sought to achieve. See McCrudden (1982) 2 *Oxford J Legal Studies* 345.

⁵¹ Namely, it is a measure of their worth and an investment in their financial security should their marriages break down: Dlamini 1984 *De Jure* 151-2 and Chinyenze (n46) 241 and see generally Bennett *Sourcebook* 197-9. This idea does not seem to have influenced systems of customary law in Namibia.

⁵² Dlamini (1985) 18 *CILSA* 363; Chigwedere (n47) 52ff; Brandel (1958) 17 *Afr Studies* 49; De Haas (1987) 46 *Afr Studies* 41-2.

⁵³ See Dlamini (n45) 232 and Uzodike (1990) 2 *Afr J Int & Comp L* 290.

⁵⁴ Moreover, the South African courts have held that for purposes of marriage by civil/Christian rites bridewealth is not essential: *Tobiea v Mohatla* 1949 NAC 91 (S); *Ntsimango* 1949 NAC 143 (S); *Ntabeni v Mlobeli & another* 1949 NAC 158 (S).

⁵⁵ This emerges from the work of the international Committee on the Elimination of Discrimination Against Women, set up under art 17 of CEDAW: Kaganas & Murray (n6) 126. See generally Simons *African Women* ch 8 and Dlamini (1989) 22 *CILSA* 330.

⁵⁶ Cf Becker & Hinz (n4) 118-19.

⁵⁷ Dlamini (n55) 342-3 and 1991 *Acta Juridica* 77-9.

wife or wives have a choice in the matter (and even the first wife could protect herself by insisting on a civil/Christian marriage).⁵⁸

Even so, it is true that men have a right that women do not. Does a constitutional norm of non-discrimination now mean that this right should be abolished or that women should be allowed to take more than one husband? The second question is easier to answer than the first. Polyandry does not have the sanction of any cultural tradition in Namibia, and to introduce it as the solution to objections against polygyny would be a whimsical response to the problem.

As for the first question, the depth of feeling about polygyny elsewhere suggests that an immediate ban would be difficult to enforce and hence inadvisable.⁵⁹ Instead, the gradual process of disuse should be allowed to take its course. There is every reason to think that polygyny is obsolescent and that in time it will disappear.⁶⁰ In the interim a compromise with the norm of non-discrimination might be found in a proposal from the 1968 Kenyan commission on marriage: that the consent of the first wife of a potentially polygynous marriage be obtained before the husband can contract a subsequent union.⁶¹ This rule would complement the customary practice that a man at least consult his senior wife (or wives) if he wants to marry again.⁶²

(b) Personal relations

It follows from the principle of patriarchy that men are regarded as the heads of their families, and as such they often claim sole powers of decision-making in matters as diverse as whether to adopt birth-control measures, whether to buy or alienate a house, how to educate children and whether a wife may work. Especially when husbands have paid bridewealth, they assert an ill-defined assortment of powers and rights over their spouses,⁶³ including a right of chastisement and a right to demand sexual favours at will.

⁵⁸ Armstrong et al (n2) 336-7 question the viability of this option, arguing that the woman's choice must be evaluated in terms of the alternatives open to her and whether her decision was properly informed.

⁵⁹ Becker & Hinz (n4) 119. Kaganas & Murray (n6) 133. Men would simply be invited to take more wives without celebrating subsequent unions as official marriages, which, according to Becker & Hinz (n4) 63, is happening in Namibia.

⁶⁰ Becker & Hinz (n4) 63 regarding Owambo and 83 regarding the Herero. Cf Armstrong et al (n2) 338.

⁶¹ See Read (1969) 5 *East African LJ* 116.

⁶² Two unreported cases from Malawi are discussed by Wanda (1988) 27 *J Legal Pluralism* 130. In *Poya* (National Traditional AC CivApp 38 of 1979) and *Wasili* (National Traditional AC CivApp 86 of 1979), where a husband had married another wife without the consent of his first wife, the women sued for divorce. They were successful on the ground that failure to obtain the first wife's consent was contrary to customary law and that it was cruel to marry again without proper consultation. The author, however, questions whether customary law was accurately stated. As he says, the practice of consulting the first wife is a matter of convention, not law; and to treat non-consultation as cruelty strains the concept. In any event, both judgments were overruled in a third case, *Chimengo v Wilson* (National Traditional AC CivApp Case 114 of 1979), where the first wife's consent was treated as a formality.

⁶³ Hence even in Owambo, where the various marriage prestations do not perform the same function as the South African lobola, men demand obedience from their wives on the ground that their

In matrilineal societies, it is true that a husband's authority is 'tempered by, and in competition with, the authoritative roles of senior members of the wife's (and her children's) matrilineage to whom the husband was an outsider'.⁶⁴ In practice, however, a wife's position depends largely upon where her family is resident, since its proximity determines how much support she will in fact be able to obtain.⁶⁵

It is usually assumed that customary law endorses the male conception of patriarchy, but we need to be more discriminating. First, many issues now arising in marriage, such as birth control and alienation of a family house, were never contemplated by 'traditional' law and such questions have not been properly tested in court.⁶⁶ Secondly, contemporary social and economic roles played by women have long since outgrown the restrictions implicit in the popular notion of patriarchy. These considerations suggest that spousal relations be reassessed in order to give effect to social practice and constitutional norms rather than a vague traditional ideal.

If the balance of the husband-wife relationship is to be corrected, equal powers of decision-making, especially regarding spousal violence, the rearing of children and the purchase and alienation of family property, need urgent attention. Although customary law may not have a full repertoire of rules to govern inter-spousal relations, a normative framework is already in place for developing a matrimonial law more suitable for current needs. These norms can be found in art 10 of the Constitution and especially in art 14(1), which requires equal rights for men and women 'during marriage and at its dissolution'.⁶⁷ Article 14 has further support from art 5(a) of CEDAW,⁶⁸ which requires states parties

'To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women'.⁶⁹

(c) Property relations

The customary rules regulating spouses' proprietary relations were conditioned by the subsistence economy of pre-capitalist Africa. In de facto monogamous marriages the

'purchase' established male authority: Becker & Hinz (n4) 61. See the same authors (at 83) for the Herero and (at 102) for Caprivi.

⁶⁴Becker & Hinz (n4) 68.

⁶⁵Becker & Hinz (n4) 69 and 86. The authors note (at 102) that in Caprivi residence is normally virilocal, and in Kavango, aside from an initial phase of uxorilocal residence, other communities are viri- or neolocal.

⁶⁶Although a South African case - *S v Ncanywa* 1992 (2) SA 182 (Ck) - held that forcible sex with a wife constituted criminal rape, the decision was overturned on appeal: *S v Ncanywa* 1993 (2) SA 567 (CkA).

⁶⁷This would be a situation where horizontal application of constitutional rights should be permitted in terms of the doctrine of *Drittwirkung* (see ch IV(2)(g)), for customary law often lacks specific rules of its own.

⁶⁸See art 16(1)(c)-(g), which deals specifically with spousal relations. Article 23(4) of the Covenant on Civil and Political Rights is also relevant in this respect.

⁶⁹Following South Africa's signing of the Convention, the common-law rule that husbands have marital power over their wives was abolished by s 29 of the General Law Fourth Amendment Act 132 of 1993.

husband generally managed the estate, except for items of personal property, which belonged to the individual concerned.⁷⁰ (Only in Caprivi is there a concept of a joint marital estate owned by the spouses in common.)⁷¹ In polygynous households a distinction was normally drawn between the property falling into each of the wives' houses. In broad terms, all property acquired by the inmate of a house, including the wife, became part of the house estate, and when the familyhead died it was inherited by the heir to the house.⁷² A family estate, consisting of acquisitions by the familyhead, would be inherited by his general heir.⁷³

While customary law obliges the head of the household to use all property under his control for the common good of the family, management of the estate lies within his discretion.⁷⁴ (There is a significant absence of rules controlling negligent or corrupt management.) During the marriage, provided that relations between the spouses are harmonious, this regime would not necessarily work to the prejudice of the wife, but through a combination of two factors wives can find themselves in serious straits if their marriages are dissolved. The first is the likelihood that wives (because of poorer economic prospects) will acquire far less property during marriage than their husbands. The second is the lack of any duty on husbands to maintain their wives once marriage ends. In theory, the divorcée is absorbed back into her own family, but poverty may discourage the realization of this rule in practice.⁷⁵

The Constitution cannot be expected to cure all these ills, although its provisions will no doubt provide a set of goals towards which reform should aim. The most glaring contradiction between customary law and fundamental rights would be a wife's lack of control over property. While few systems of customary law in Namibia seem overtly to discriminate against wives in this respect, the situation is not entirely clear. Accordingly, the first and the most important step towards creating a fairer proprietary regime would be to give all women full control over their acquisitions.⁷⁶ Once wives have outright ownership, the work of the courts is done. With only a norm of equal treatment to go on, they cannot determine the precise nature and modalities of a

⁷⁰ See above ch VI(2)(a). Thus, in the case of marriages contracted according to civil or Christian rites, s 17(6) of the Native Administration Proc 15 of 1928 provided that the spouses had separate estates on the assumption that they would be culturally predisposed to accept this form of proprietary regime: Olivier et al *Die Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes* 246.

⁷¹ The estate is composed of articles belonging to the household. Property acquired by the spouses before or during the marriage remains their own: Becker & Hinz (n4) 99.

⁷² *Sijila v Masumba* 1940 NAC (C&O) 42 at 44-7. There is a significant lack of material on the exact disposition of property in polygynous households in Namibia, no doubt because polygyny has become rare.

⁷³ See Bennett *Sourcebook* 237-8.

⁷⁴ See Becker & Hinz (n4) 84 regarding the Herero. See further: *Sijila's case supra*; *Mbuli* 1939 NAC (N&T) 85; *Sitole* 1945 NAC (N&T) 50; and *Ngcobo* 1946 NAC (N&T) 14.

⁷⁵ See Bennett *Sourcebook* 275ff.

⁷⁶ This would follow from art 16 of CEDAW and horizontal application of arts 10(2) and 14(1) of the Constitution.

matrimonial proprietary regime, nor can they fashion a system of post-marital support obligations. These are complex subjects requiring statutory regulation.⁷⁷

(d) Civil/Christian marriages

According to Roman-Dutch law, marriage was automatically in community of property and of profit and loss and the wife was subject to her husband's marital power.⁷⁸ Section 17(6) of the Native Administration Proclamation, however, allowed African spouses wanting to enter a civil/Christian marriage to choose community of property and of profit and loss simply by making a prenuptial declaration before a marriage officer or commissioner.⁷⁹ This idea was derived from earlier Transkei legislation, which modelled the consequences of civil marriage as closely as possible on those of a customary union.⁸⁰ The declaration is an inexpensive method of varying the matrimonial proprietary regime, although if the spouses want to enter into an antenuptial contract, there is nothing to prevent them from doing so.⁸¹

Section 17(6) did not purport to introduce customary law⁸² nor did it change the common law governing the marital relationship any more than was specified. Thus, in terms of common law, the husband continued to have marital power over his wife⁸³ and his power would not be excluded in the prenuptial declaration.⁸⁴ Because the marital power was retained, the wife's status was similar to that of a minor. For example, she had no locus standi in judicio,⁸⁵ her contractual capacity was limited⁸⁶ and so, too, was her delictual capacity.⁸⁷

⁷⁷ In the case of the common law, the matrimonial property system may be further varied by antenuptial contracts. See Hahlo (n22) 154-5.

⁷⁸ *Ex Parte Minister of Native Affairs: in re Molefe v Molefe* 1946 AD 315.

⁷⁹ 15 of 1928: 'A marriage between natives, contracted after the commencement of this Proclamation, shall not produce the legal consequences of marriage in community of property between the spouses: Provided that in the case of a marriage contracted otherwise than during the subsistence of a customary union between the husband and any woman other than the wife it shall be competent for the intending spouses at any time within one month previous to the celebration of such marriage to declare jointly before any magistrate ... or marriage officer... that it is their intention and desire that community of property and of profit and loss shall result from their marriage, and thereupon such community shall result from their marriage.' As Becker & Hinz (n4) 30 note, however, this provision was applicable only outside the so-called police zone.

⁸⁰ In Lesotho, on the other hand, *Khatala* 1964 HCTLR 97 simply allowed customary law to decide the property consequences of marriage, and Poulter *Legal Dualism* 72-4 applauds choice of law based on life style rather than marriage. Similarly, in Swaziland (under s 24 of the Marriage Act 47 of 1964), in Botswana (under s 7(1) of the Married Women's Property Act 69 of 1970) and in Zimbabwe (under s 13 of the African Marriages Act ch 238) the property consequences of civil/Christian marriage continue to be governed by customary law.

⁸¹ *Bennett Application* 156.

⁸² *Ex Parte Minister of Native Affairs: in re Molefe v Molefe* 1946 AD 315 at 319.

⁸³ *Figlan* 5 NAC 70 (1924); *Mambi v Mtshisa* 5 NAC 98 (1927).

⁸⁴ Although it could be by antenuptial contract.

⁸⁵ *Rabotapi v Nkonyane* 1946 NAC (N&T) 72; *Twala v Nsuntsha* 1954 NAC 35 (C); *Mtonjana v Jaxa* 1972 BAC 91 (S). Her lack of capacity could, of course, be remedied by the appointment of a curator ad litem or a grant of *venia agendi*: *Mototsi v Mamabolo* 1934 NAC (N&T) 71.

In South Africa, the *common law* regarding matrimonial property and marital power was changed by the 1984 Matrimonial Property Act,⁸⁸ but this legislation was not extended to Namibia.⁸⁹ Thus a dramatically different property regime governed marriages of Africans and those of whites, one that worked to the obvious disadvantage of wives married by civil/Christian rites (although women could protect themselves by concluding an antenuptial contract).

The long overdue reform finally appeared in the Married Persons Equality Act,⁹⁰ which abolished marital power, thereby giving wives the contractual and other powers they would have lacked under common law. The husband is no longer head of the family (unless the spouses otherwise agree),⁹¹ and both spouses have equal powers regarding common marital property and debts.⁹² The Act is retrospective in effect,⁹³ and, on the face of it, applies to civil/Christian marriages contracted by Africans.

4 DIVORCE

In South Africa, based on the premise that customary marriages are transacted privately by the families concerned, the courts have disclaimed any general power to dissolve customary marriages.⁹⁴ As a result, divorce may be arranged extra-judicially. Admittedly this ruling gave Africans a cheap and expeditious method for terminating their marriages, but vulnerable parties - the wife and the children - lost the protection of an authoritative and disinterested outsider, the court.

⁸⁶ *Rabotapi's case supra; Mpushu & others v Mjolo* 1976 (3) SA 606 (E).

⁸⁷ *Cf Malunga v Zilwana* 1947 NAC (N&T) 64.

⁸⁸ No 88.

⁸⁹ Initially the 1984 Act had no effect on civil/Christian marriages contracted by Africans in South Africa either: Sinclair *Introduction to the Matrimonial Property Act 1984* 62-3 for criticism. When the South African Law Commission *Marriages and Customary Unions of Black Persons* para 11.8.4 considered African marriages, it concluded that the consequences of civil/Christian marriage should be the same for all people in the country. It also proposed (in para 11.8.7) that spouses married prior to the 1984 Matrimonial Property Act should be entitled to change their property regime and to exclude marital power if they wished. Both these proposals were translated into law by the Marriage and Matrimonial Property Law Amendment Act 3 of 1988. Section 22(6) of the Black Administration Act was repealed, with the implication that the accrual regime applied to Africans, and chapters 2 and 3 of the Matrimonial Property Act were also made applicable to African civil marriages. As a result all marriages are automatically in community of property and of profit and loss and the husband's marital power is excluded: where a marriage is out of community of property, the accrual system may be made applicable: s 3 of Act 3 of 1988. This regime may be varied by antenuptial contract only.

⁹⁰ 1 of 1996.

⁹¹ Section 3(b).

⁹² Subject to various exceptions listed in s 7, a spouse's juristic acts in respect of a joint estate do not require the consent of the other spouse.

⁹³ Section 4. The legal consequences of acts performed prior to the statute are not, however, affected: s 2(2).

⁹⁴ Thus the Yeyi khuta in Caprivi said that 'people can only divorce on their own': Becker & Hinz (n4) 96. See, too, *Saulos v Sebeko & another* 1947 NAC (N&T) 25, *Duba v Nkosi* 1948 NAC 7 (NE) and Bennett *Sourcebook* 249ff.

It could be argued, however, that courts may not refuse to hear divorce suits, for art 12(1)(a) of the Constitution gives every person the right 'to a fair and public hearing by an independent, impartial and competent Court of Tribunal established by law' in order to determine 'civil rights and obligations' and divorce actions clearly involve civil rights and obligations. The question of horizontality would be problematic here, because, although art 12 is clearly opposable against the state, there are no reasons to suppose that it could be invoked against a private individual.⁹⁵ Moreover, the way in which art 12(1) is framed might suggest that the right is to a *fair trial*, not simply to adjudication of a dispute.

Both spouses are in principle free to terminate their marriages if and when they choose, but in reality women are at a disadvantage when compared with men. Customary law generally follows the breakdown principle, an approach that should cater impartially for both spouses. Yet, in practice some grounds of divorce, such as witchcraft, barrenness and single acts of adultery, avail husbands rather than wives.⁹⁶ The prohibition on discrimination under arts 10(2) and 14(1) of the Constitution, coupled with the CEDAW principle that women should have the same rights as men on dissolution of marriage,⁹⁷ would be sufficient reasons for the courts to exercise their discretion as much in favour of wives as husbands.

Customary procedures for obtaining divorce may also place the wife at a disadvantage. In Caprivi, for instance, because she lacks *locus standi*, the woman must obtain her guardian's assistance to prosecute the action.⁹⁸ (And, in societies where bridewealth is central to the marriage, the guardian may be reluctant to return it.)⁹⁹ Appeal is now possible to art 14(1), which guarantees equal treatment for women on dissolution of marriage.¹⁰⁰ From this principle it follows that women have a substantive right to end their marriages.¹⁰¹ Any procedural incapacity can, if necessary, be cured by the appointment of a curator ad litem.¹⁰²

⁹⁵ Thus, although a wife could insist that a court hear her case, she could not at the same time insist that her husband/guardian be party to the action.

⁹⁶ As would be the case in Caprivi, for instance, where men claim licence to be promiscuous: Becker & Hinz (n4) 98. Armstrong et al (n2) 351. See Nhlapo's discussion (n25) 79ff about why the grounds for dissolving marriage tend to work to the benefit of husbands rather than wives.

⁹⁷ Article 16(1)(c).

⁹⁸ That is, both the procedural power to argue a case in court and the substantive power to change status relationships. The existing law is stated in *Nqambi* 1939 NAC (C&O) 57 at 59 and *Phiri v Nkosi* 1941 NAC (N&T) 94. See discussion by Simons (n55) 129-35 and Becker & Hinz (n4) 104.

⁹⁹ Armstrong et al (n2) 352.

¹⁰⁰ This principle follows from an analogy with the freedom to marry whomever one chooses: if spouses may not be forced into a marriage against their will, they must also be free to terminate it when they wish. Appeal to art 10(2) of the Constitution to solve this problem would be a more difficult route to follow, since the usual question of horizontality would arise.

¹⁰¹ Once this right is accepted, then it would also follow that women can sue for matters related to divorce, such as maintenance and custody.

¹⁰² See the South African decision in *Mokgatle* 1946 NAC (N&T) 82.

On divorce, amongst the Herero, children used to remain with their father.¹⁰³ In matrilineal societies, the mother's family (especially her brother) has a preferent right to the children.¹⁰⁴ In Caprivi children are deemed to belong to both families, but on divorce they usually remain with the father.¹⁰⁵ In any case, guardianship of children goes to the family rather than the individual parent, for in theory marriage is an alliance of two families, not two individuals.¹⁰⁶ Strictly speaking, therefore, a mother had no right to her children. On the basis of equal rights under arts 10(2) and 14(1) of the Constitution, however, there are sound reasons for giving mothers the right to claim their offspring from husbands and/or customary-law guardians.

As far as custody of children is concerned, South African courts amended customary law to give effect to the principle that the child's best interests prevail.¹⁰⁷ Although the best interests rule was not incorporated into the Namibian Constitution, the UN Convention on the Rights of the Child would be a ground for extending the principle to govern all areas of customary law dealing with the custody and guardianship of children on divorce.¹⁰⁸

Customary law, as we have seen, had no notion of post-divorce maintenance.¹⁰⁹ When marriage ended, a wife was expected to return to her former guardian taking with her only personal possessions.¹¹⁰ Research is needed to establish what the economic position of women in fact is after marriage,¹¹¹ but, whatever the findings, an ingenious argument of indirect discrimination would be needed to change the law on the basis of equality provisions in the Constitution alone. While the lacuna regarding alimony works to the prejudice of women rather than men, there is no formal discrimination between the

¹⁰³The position today, however, is unclear: Becker & Hinz (n4) 88. Despite the influence of the matriline, fathers usually have a decisive say in their upbringing.

¹⁰⁴Becker & Hinz (n4) 74-5 note, however, that the father's authority was not entirely excluded, for he was head of the household. By contrast, with the cognatic systems of Caprivi, children belong to both families, though there is preference for the father's: Becker & Hinz (n4) 92.

¹⁰⁵Bridewealth does not function so much to affiliate children to a family as to declare the validity of marriage: Becker & Hinz (n4) 96 and 104. Rules regarding guardianship are, however, flexible, allowing children a wide measure of choice: Becker & Hinz (n4) 105.

¹⁰⁶Bennett *Sourcebook* 289-91.

¹⁰⁷*Mkize* 1951 NAC 336 (NE) and *Msiza & another v Msiza* 1980 AC 185 (C) at 191.

¹⁰⁸Nowadays, according to Becker & Hinz (n4) 76, older children tend to make their own decisions in any event.

¹⁰⁹Its main concern was to balance the families' interests through return or retention of bride-wealth. Holleman *Shona Customary Law* 266ff illustrates this point.

¹¹⁰In Caprivi, however, the joint marital estate is divided on divorce into two equal parts: Becker & Hinz (n4) 100.

¹¹¹In South Africa, for example, women seldom receive any support from their natal families and they are usually left to raise young children alone. Granted, the courts are prepared to hold a father liable for the support of his children, but they have not yet given a ruling on maintenance of former spouses. In *Muru* 1980 AC 39 (S), *Gcumisa* 1981 AC 1 (NE), and *Ngcobo v Nene* 1982 AC 342 (NE) at 348, common law was applied without comment, but, in *Sibanda v Sitole* 1951 NAC 347 (NE), customary law was applied by reason of the parties' lifestyles.

sexes.¹¹² Again, judicial review is not the appropriate answer to this problem. The courts cannot simply prescribe a general duty to pay spousal maintenance; the detailed provisions required to determine contingencies of payment suggest a need for legislation.

5 SUCCESSION

(a) Inheritance by widows

In customary law succession is intestate,¹¹³ universal and onerous. An heir generally inherits not only the deceased's property but also the responsibilities, in particular the duty to support surviving family dependants.¹¹⁴

While in matrilineal systems a man's maternal relatives had preferent claim to his property,¹¹⁵ a general trend towards patrilineality is occurring, whereby children now inherit from their fathers. Traditional leaders are prepared to support this development, but in no circumstances do they allow a widow to inherit her husband's movable property.¹¹⁶ Among the Herero, upon the death of a familyhead, his oldest son (if the deceased had more than one wife, it would normally be the oldest son of his first wife)¹¹⁷ succeeds to the deceased.¹¹⁸ Caprivi seems to be the only area where widows regularly inherit their deceased husbands' property, a practice that is said to be necessary 'to feed the kids'. If children are already grown up, they take their father's property 'to feed the mother'.¹¹⁹

Constitutional norms of equal treatment and non-discrimination, in particular art 14(1) requiring equal treatment on dissolution of marriage, pose a major challenge to the tendency to exclude widows from inheritance. Any customary rule that the deceased's heir be male would constitute prima facie discrimination against female descendants. Admittedly, a widow usually has the right to insist that the heir maintain her out of the deceased estate,¹²⁰ but the right may be hedged round with restrictions: that the widow

¹¹²This lacuna could, of course, be a ground for application of the fundamental rights in private relationships.

¹¹³Although dispositions of property mortis causa are possible, they are not the same as common-law wills: Bennett *Sourcebook* 408.

¹¹⁴Bennett *Sourcebook* 396-7.

¹¹⁵Becker & Hinz (n4) 65-6 and 67 on Owambo.

¹¹⁶Becker & Hinz (n4) 67.

¹¹⁷Becker & Hinz (n4) 83. In Caprivi, because all wives have equal status, the first wife's house enjoys no special privilege: Becker & Hinz (n4) 98.

¹¹⁸See Bennett *Sourcebook* 399ff for the order of succession in monogamous and polygynous families. It may be, however, that preference for the oldest son is declining: evidence from various parts of South Africa indicates that the youngest son now tends to inherit: Bekker (1992) 25 *CHL-SA* 368-9.

¹¹⁹Although daughters as well as sons can inherit, sons are given preference: Becker & Hinz (n4) 101.

¹²⁰See generally Bennett *Sourcebook* 416ff.

continue to reside at the deceased's homestead and perform her wifely duties.¹²¹ Without the support of their natal families, African widows can find themselves in a desperate situation, because the lower earning power of women means that they will be unable to support a family without assistance from the estate.

The constitutional guarantee of equal treatment might be enough to overturn the customary bar on widows inheriting, despite their right to maintenance out of the estate.¹²² The position of female descendants has already been considered by the Zimbabwe Supreme Court. In *Chihowa v Mangwende*,¹²³ the deceased had died intestate leaving no male descendant, but a widow, two major daughters, a father, and four brothers. Under customary law a male relative should have inherited the estate, but one of the daughters applied for an order that she was entitled to succeed. The court regarded lack of capacity as the only barrier to females succeeding to the estates of their male relatives. With the removal of minority under the Legal Age of Majority Act,¹²⁴ women became eligible heirs.¹²⁵ Unfortunately, *Chihowa's* case offered no hope for widows, because it did not upset the customary rule of primogeniture.¹²⁶

(b) Levirate unions

Under certain systems of customary law, notably Herero,¹²⁷ if a familyhead died and if his widow were still young and capable of bearing children, she would be expected to enter into a levirate union with one of the deceased's male relatives. This institution ensured that death would not disturb the relationship between the spouses' families and that the widow could continue to produce children for her husband's patriline.¹²⁸

Levirate unions are well on the way to becoming obsolete,¹²⁹ and are thus unlikely to present problems under ch 3 of the Constitution. Nevertheless, rules are already in place to deal with the odd cases that might arise. The principle of freedom of marriage

¹²¹While information on these contingencies is not available for Namibia, this was the finding in several South African cases, inter alia, *Myuyyu v Nobanjwa* 1947 NAC (C&O) 66, *Mavuma v Mbebe* 1948 NAC (C&O) 16, *Kgumare* 1948 NAC (N&T) 21 and *Tulumane v Ntsodo* 1953 NAC 185 (S). Indeed, the principle that the widow remain with her husband's family if she is to benefit from the estate would follow the logic of customary law.

¹²²No matter how difficult the right may be to enforce. See Bennett *Sourcebook* 418-19.

¹²³1987 (1) ZLR 228 (S). See casenote in (1986) 4 *Zimbabwe LR* 168.

¹²⁴15 of 1982.

¹²⁵And subject to an heir's usual responsibilities to support the deceased's dependants. By implication, in order to fulfil her obligations, a female heir would have to play the same roles as the head of a family.

¹²⁶Thus, according to *Muriso NO v Muriso* 1992 (1) ZLR 167 (S), *Chihowa* could not be read to allow a widow to be appointed the intestate heir of her husband's estate.

¹²⁷Becker & Hinz (n4) 79.

¹²⁸Preston-Whyte in Hammond-Tooke *Bantu-speaking Peoples of Southern Africa* 189-92.

¹²⁹Cf the Herero Becker & Hinz (n4) 83.

guards against women being forced into such unions against their will, and courts elsewhere have already enforced this principle in terms of the repugnancy proviso.¹³⁰

¹³⁰*Nbono v Manoxoweni* (1891) 6 EDC 62 concerned levirate unions and *Gidja v Yingwane* 1944 NAC (N&T) 4 sororal unions.

IX PROPERTY RIGHTS AND LAND

1 OWNERSHIP OF THE RESERVES

After the colonization of Namibia (as in South Africa and Zimbabwe), most land passed into settler hands and is now held subject to common law. Customary law persists only in enclaves that were declared 'reserves' for the indigenous population.¹

The first 'scramble for land' occurred between 1884-1915 when German rule was extended over Namibia.² In 1898, in order to facilitate white settlement and control labour the Governor created Witbooi, Herero and Dama reservations in the southern part of the territory.³ Outside these areas Crown lands were proclaimed and allocated to settlers, especially concession companies. By 1903 one third of the country had been disposed of in this way.⁴

A second land scramble occurred in the 1920s when the territory fell under South African administration. Land not in settler ownership was deemed Crown land until specifically reserved for the occupation of the indigenous inhabitants.⁵ In 1923 the Administrator confirmed reserves created by the German regime,⁶ namely, those south of the 'red line' that delimited a 'police zone'.⁷ Within this southern sector - which is 70 per cent of the country's total area- approximately 10 per cent of the land was dedicated to so-called homelands for the Damara, Nama and Herero.⁸ The northern sector contains the Kaoko, Owambo, Kavango and eastern Caprivi reserves, together some unalienated state land and nature reserves.

In 1954 the South African Administration vested the reserves in the South African Bantu Trust,⁹ a statutory body that was obliged to administer land set aside for the

¹In fact, three different legal regimes apply to land in Namibia: customary law in the reserves, a blend of common and statutory law in Rehoboth and common law in what were formerly white areas and state land: Parker (1991) 7 *Lesotho LJ* 101.

²Land was acquired by treaty of cession or outright confiscation, as after the Nama and Herero revolt in 1903.

³As Du Pisani in Töttemeyer *Namibia in Perspective* 18 says, land and labour policies were inextricable.

⁴Du Pisani op cit 16.

⁵Under the Land Settlement Procs 14, 29, 47 and 53 of 1920 and the Crown Land Disposal Proc 13 of 1920. See Hinz, *Customary Land Law and the Implications for Forests, Trees and Plants (Final Report)* 12. Hinz op cit 18ff gives a useful account of the land legislation that will be considered below.

⁶In terms of the Native Administration Proclamation 22 of 1922, the Administrator was given sole power to create reserves.

⁷As defined by the Prohibited Areas Proc 26 of 1928. The 'red line' was from time to time extended farther north to add more land to the southern sector and thus allow white settlement.

⁸The remainder comprised the prohibited diamond areas, game reserves and unalienated state land.

⁹In terms of s 4 of the South West Africa Native Affairs Administration Act 56 of 1954. The Trust was established under South Africa's Native Trust and Land Act 18 of 1936 and the Gover-

African occupation 'for the settlement, support, benefit, and material welfare of the Blacks'.¹⁰ By implication reserve land could no longer be considered available for allocation to white settlers.

As apartheid evolved into separate development, lands held by the trust were deemed 'areas for native nations',¹¹ and in 1978 they were transferred from the control of (what had come to be called) the South African Development Trust to the Administrator-General of South West Africa.¹² Soon afterwards powers of administration¹³ were given to the legislative authorities of the homelands created under the Representative Authorities Proclamation¹⁴ By an amendment to this enactment full ownership of what were now described as 'communal lands' was vested in the homeland governments¹⁵ (although the Administrator-General remained trustee).¹⁶ Shortly before independence, the representative authorities were dissolved and their powers were returned to the Administrator-General.¹⁷

Schedule 5 of the Constitution provided that 'all property of which the ownership or control immediately prior to the date of Independence' vested in the government of South West Africa 'shall vest in the Government of Namibia'. Article 100, under the title 'Sovereign Ownership of Natural Resources', provided that 'Land, water and natural resources ... shall belong to the State if they are not otherwise lawfully owned'. Relying particularly on art 100, Prime Minister Hage Geingob claimed that 'people in the communal lands ... have no acknowledged right, independent of the will of the state, to live and farm in the Communal Areas'.¹⁸

Hence the argument has been put forward that the state is now technically owner of reserve lands. The government's claim rests on a derivative title, ironically one that must find its basis on acts of the German and South African regimes.¹⁹ Such an assertion is possible only if land subject to customary law was deemed not 'lawfully owned' at the

nor-General, later the State President, was nominal trustee. In 1978, Proc AG 19 transferred all trust matters to the South African appointed Administrator-General.

¹⁰Section 4(1) of the Native Trust and Land Act 18 of 1936.

¹¹As created by the Development of Self-government for Native Nations in South West Africa Act 54 of 1968. Under s 2 of this statute, Damaraland, Hereroland, Kaokoland, Okovangoland, Eastern Caprivi and Ovamboland were listed as such areas. Under s 2(g) - which empowered the State President to reserve other lands for 'the exclusive use and occupation by any native nation' - Bushmanland was created by Proc R208 of 1976.

¹²Proclamation AG 19 of 1978.

¹³ie acquisition, alienation, grant, transfer, occupation and possession.

¹⁴Section 14, as read with Item 1 of the Schedule to the Representative Authorities Proc AG 8 of 1980.

¹⁵Section 48*bis*(1)(a) of Proc AG 8 of 1980.

¹⁶Section 48*bis*(1) of Proc AG 8 of 1980 was inserted into the enactment by Proc AG 4 of 1981.

¹⁷Representative Authorities Power Transfer Proc AG 8 of 1989.

¹⁸'Prime Minister's Address' to the National Conference on Land Reform and the Land Question 25 June-1 July 1991, Windhoek. See too Parker (n1) 94.

¹⁹See Harring 'The Constitution of Namibia and the Land Question' paper delivered at a workshop on Traditional Authorities in the Nineties - Democratic Aspects of Traditional government in Southern Africa (1995) 5.

time of Independence and therefore not subject to the protection of the property clause (art 16 in the chapter on fundamental rights). To contend that African land falls outside the scope of art 16, however, *prima facie* suggests discrimination: namely, that African tenure is not to be protected on a par with white tenure.²⁰

The government's claim to be owner of the communal lands cannot rest on Schedule 5, because a Schedule may not detract from the substance of rights guaranteed in the body of the Constitution, especially of course arts 16 and 10.²¹ Article 100, on the other hand, the foundation of the Prime Minister's argument, is located in chapter 11 of the Constitution, the chapter on Principles of State Policy. Because these principles are not legally enforceable,²² the state has no *legal* right on which to base its title.²³

Conversely, if it is acknowledged that the state of Namibia succeeded to the rights and powers exercised by the former South African regime, then the state's rights will be restricted by the trust that was established for the reserves in 1954. It follows that the government cannot hold the reserves as full owner.²⁴

If the government of Namibia is not owner of reserve lands, where does ownership lie? The most obvious response is in the communities themselves, an answer which presupposes the existence of a primordial aboriginal title. This doctrine maintains that the property rights of indigenous peoples were undisturbed by colonization. The 1991 National Conference on Land Reform and the Land Question²⁵ decided that such historical land claims would not be pursued in Namibia (because of the strong likelihood of competing claims and the difficulty of proving them), but its decision is obviously not legally binding.

Authority in Namibian law for invoking aboriginal title has three possible sources. The first would be a relatively weak argument that such title is implicit in the right to culture (which is encoded in art 19 of the Constitution). The contention would be that a people's culture should include recognition of the institutions necessary to maintain the culture as a living reality.²⁶ A second source for the doctrine could be international customary law,²⁷ which Namibia is obliged to apply as part of its municipal law.²⁸ Finally,

²⁰Such an implication would fall foul of art 10(2) of the Constitution which prohibits discrimination on the basis of race or ethnicity: *Harring op cit* 10ff. As *Harring op cit* 13 says: 'If communal lands are not "property" under Article 16(2) then they are not subject to the principle of just compensation, and the state can engage in encroachments on this property, entirely black property, with only political considerations not subject to added economic cost.' See, too, *Hinz (n5)* 11.

²¹*Harring op cit* 16-17.

²²Article 101.

²³*Harring (n19)* 14-15.

²⁴*Hinz (n5)* 17 says that: 'All restrictions stemming from the Development Trust and Land Act are still inherent in the right to "ownership" and "control", as spelled out in Schedule 5 to the Constitution.'

²⁵Clause 2 (n18).

²⁶And aboriginal title is everywhere connected with assertions of cultural identity and autonomy.

²⁷The principle originated in the fifteenth and sixteenth centuries in the writings of certain Spanish jurists, who argued on the basis of natural law that native communities had certain rights that were unaffected by colonial conquest. See *Crawford The Creation of States in International*

because aboriginal title was accepted by Grotius,²⁹ it could through his work be deemed part of Namibia's common law.

Both the latter sources find additional support in judicial precedent of former British colonies. From the start of its colonial venture, Britain's policy was guided by a self-denying ordinance that indigenous land rights in the colonial territories were to be respected,³⁰ unless and until they were extinguished by the Crown. While this policy first came to fruition in the United States in the early nineteenth century,³¹ it subsequently took even firmer root in Canada, New Zealand and Australia. In 1973, a Canadian Supreme Court judgment laid down the principle that native Canadians had a title to their lands that colonial settlement did not interrupt.³² Two years later, New Zealand recognized indigenous Maori title by the Treaty of Waitangi Act,³³ and in 1992 the dramatic decision of *Mabo v Queensland*³⁴ accepted aboriginal title as part of Australian law.³⁵

In all these jurisdictions, autochthonous land titles were initially regarded as rights contingent on state recognition.³⁶ Academic writers, however, argued for a so-called doctrine of continuity, namely, that aboriginal title is a fundamental right, predating the colonial state and not dependent for its existence upon treaty or statute. Hence, unless

Law 173 and 175, Lindley *The Acquisition and Government of Backward Territory in International Law* 12-17 and Williams (1990) 5 *Law & Anthropology* 237.

²⁸Article 141. See generally McHugh *The Maori Magna Carta* 171-6.

²⁹See *Mare Liberum* ch 2 and 13 and *De Jure Belli ac Pacis* 397 and 550.

³⁰As early as the seventeenth century, it was established in *Calvin's Case* (1608) 7 Coke's Rep 1a; 77 ER 377 at 398 that Britain would recognize the existing laws of a conquered territory. In the eighteenth century this policy was confirmed by *Campbell v Hall* (1774) 1 Cowper 204.

³¹*Johnson v M'Intosh* 21 US (8 Wheaton) 541 (1823) at 589, the first of a long series of cases in which aboriginal title was to be elaborated by the Supreme Court, held that, although the colonizer was free to deal with native lands in any way it thought fit, legal right was to be modified by 'humanity' and 'a wise policy'. See further *US v Percheman* 32 US (7 Peters) 51 (1831) at 86-7. Thus it is fully accepted in the United States that native Americans are entitled to inhabit the land of their ancestors and to exploit all its resources: *Winters v US* 207 US 564 (1908). See Glavovic (1993) 26 *CILSA* 268-74 for a brief historical overview.

³²In *Calder v A-G of British Columbia* (1973) 34 DLR (3d) 145 the Canadian Supreme Court divided on the question. But twelve years later, *Guerin v The Queen* (1985) 13 DLR (4th) 321 at 335-7 held that aboriginal title was a legal right predating the colonization of Canada and that it did not depend on recognition by the Crown. Further judicial activity was then superseded by s 35(1) of the 1982 Constitution, which guaranteed the 'aboriginal and treaty rights of the aboriginal peoples of Canada'. See Sanders (1983) 61 *Canadian Bar Rev* 314ff.

³³This Act established an informal tribunal to inquire into and report on Maori allegations that actions of the Crown were in conflict with Maori sovereignty. See McHugh (1984) 2 *Canterbury LR* 235. *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 went further, however, to acknowledge the non-statutory, non-treaty basis of aboriginal title.

³⁴(1992) 175 CLR 1.

³⁵The Court found (at 38-9 and 41, respectively) the earlier ruling that the continent was terra nullius had been factually wrong and legally outmoded.

³⁶In *St Catherine's Milling & Lumber Co v The Queen* (1889) 14 App Cas 46 (PC) at 54, for instance, the Privy Council had held that radical title remained vested in the Crown and that the Indian tribes had a personal, usufructuary right 'dependent upon the good will of the Sovereign'.

voluntarily surrendered by the titleholders, it was unaffected by colonization. Today, with the possible exception of the United States, the doctrine of continuity has been accepted in the three countries considered above.³⁷

Aboriginal title implies that an indigenous people as a collectivity may demand possession of their traditional lands³⁸ with the corollary that trespassers may be ejected,³⁹ and a right to exploit natural resources.⁴⁰ Because aboriginal title is connected with preserving native culture, it would seem that the beneficiaries are bound by the tenure implicit in their culture, which in Namibia would mean confirmation of the customary regime.⁴¹

If the Namibian government is accepted as owner of the reserves, the position of customary tenures becomes precarious, since, apart from an obligation to preserve local culture in terms of art 19 of the Constitution, the government would have no duty to continue to respect interests acquired under customary law. If on the other hand aboriginal title is taken to be part of Namibian law, then customary tenure and, more importantly, the interests it generates, must be upheld by the state.

2 THE PROBLEM OF DESCRIBING CUSTOMARY CONCEPTIONS OF PROPERTY

During the colonial period, the systems of land tenure indigenous to Africa received scant respect. They were considered primitive and decidedly inferior to western systems of property law. The reason for this prejudice rests, in part at least, on the disagreement about how to translate customary tenure into terms that would be comprehensible to western lawyers.

Customary law has no distinct category of property law.⁴² Rules that common law might regard as contract or property are subsumed under status, a categorization that

³⁷Foster (1992) 21 *Manitoba LJ* 343-4. The continuity doctrine used to be an unquestioned canon of American law: *Talton v Mayes* 163 US 376 (1896) at 383-4; *Cramer v US* 261 US 219 (1922) at 229; *US v Santa Fe Pacific Railroad Co* 314 US 339 (1941) at 347; *US v Alcea Band of Tillamooks* 329 US 40 (1946) at 51. In the words of *Mitchel v US* 34 US (9 Peters) 711 (1935) at 746 the Indian 'right of occupancy is considered as sacred as the fee simple of whites'. But the decision in *Tee-Hit-Ton Indians v US* 120 F Supp 202 (1954); 348 US 272 (1955), reverted to the contingency doctrine.

³⁸Both the concepts of aboriginality and of traditional land could be problematic for potential claimants. Do the Nama, for instance, qualify as an aboriginal people of Namibia? See Bennett (1993) 9 *SAJHR* 462ff.

³⁹*Tamaki v Baker* [1901] AC 561 (PC) at 574.

⁴⁰Beyond these rights, the implications of aboriginal title are still somewhat obscure. According to certain American decisions, individuals acquire an equitable interest of use, although one that is neither heritable nor alienable: *Choate v Trapp* 224 US 665 (1912).

⁴¹Hence, in America 'use' is taken to include the right to maintain traditional economic activities, such as pastoralism, hunting-gathering and fishing, as determined by the laws and customs of the people concerned. See Gagne (1982-3) 47 *Saskatchewan LR* 331.

⁴²See Moore (1979) 7 *Int J Sociology L* 17-19.

reflects the overriding concern in customary law with long-term, personal relationships.⁴³ Unlike western legal systems, African law stresses 'not so much rights of persons over things, as obligations owed between persons in respect of things'.⁴⁴ Western law allows individuals an assortment of rights, powers and freedoms over property, which they can assert against an anonymous public. Because customary law emphasizes the responsibilities of people associated in specific, long-standing relationships,⁴⁵ entitlements to property are narrowly conceived in terms of specific obligations arising out of the bonds of political loyalty, kinship and occasionally tort.⁴⁶

Given such a radically different attitude to property, it is difficult to do justice to customary interests in a human rights discourse - which is very much a product of western jurisprudence. A first step towards bridging the gap, of course, would be to use language more sensitively. Common-law terms obviously cannot be employed as direct translations for customary institutions, nor should we expect customary law to contain equivalents of common-law concepts. 'Ownership', in particular, is historically and culturally specific; it may well not exist in customary law.⁴⁷

A long-standing dispute about whether to use European or African languages to describe customary systems of tenure⁴⁸ was resolved, as far as the higher courts were concerned, in favour of the former.⁴⁹ Where a legal profession is schooled exclusively in

⁴³Gluckman in Gluckman *Ideas and Procedures in African Customary Law* 263. See, too, Gluckman *Politics, Law and Ritual in Tribal Society* 36-50. Part of the reason for the absence of a specific category of property lay in the non-materialist nature of African culture. Economic needs were simple and few goods had great economic importance. Rather, the value of property lay in its social or ritual functions. Hence, the way property was used indicated whether individuals had realized the correct sentiments implied in their relationships with kin, political superiors and neighbours. Cattle, for instance, were not traded: instead, they were used for paying bridewealth and tribute in order to establish relationships of marriage and political allegiance. See Bohannan in Biebuyck *African Agrarian Systems* 109-10.

⁴⁴Gluckman *The Ideas in Barotse Jurisprudence* 94 and 149. This idea is also true, of course, of the common law: Hohfeld *Fundamental Legal Conceptions* 76ff.

⁴⁵Gluckman (n44) 163.

⁴⁶Property interests are not thought of in terms of interdicts or vindicatory actions. Instead, customary remedies have a distinctively 'personal' quality. Thus the familyhead who mismanaged an estate might be deposed by a local ruler, divorced by his wife or deserted by his children - reactions that have none of the characteristics of proprietary remedies. See Bennett *Sourcebook* 392-3.

⁴⁷Allott (1961) 5 *JAL* 100. Those who begin investigating customary law with an assumption that ownership is a universal phenomenon tend to describe customary tenure as if one person (or body of people) holds a plenary right out of which fractions are given to others: lesser rights are conditional on grants by the dominus. See Allott *op cit* 99. This thinking leads to the claim (considered below) that the tribe has an 'absolute' title, the chief acts as trustee and individuals have 'usufructuary' rights.

⁴⁸In this respect, Gluckman (n44) 140 claimed that the Barotse word 'bung'a' could reliably be translated into English as 'ownership'. Bohannan in Nader *Law in Culture and Society* 401ff, a proponent of the uniqueness of each culture, argued for the use of vernacular terminology, saying that this was the only way of exposing the nuances of native thought systems. See further McCormack (1983) 21 *J Legal Pluralism* 10.

⁴⁹See generally on use of language: Bennett 1985 *Acta Juridica* 173ff. See too *Milirrup v Nabalco Pty Ltd* (1971) 17 *FLR* 151 at 164.

terms of western rules and categories, this conclusion was inescapable. None the less, colonial judges were well aware that their terminology could not be directly applied to customary law. They accordingly made adjustments,⁵⁰ but these adjustments have led to even greater misunderstanding.

In many anglophone African countries, for example, courts have referred to African rulers as 'trustees' of the land, to the tribes as holders of an 'allodial' title⁵¹ and to individual landholders as 'usufructuaries'.⁵² As a descriptive device, 'trust' helps to explain why a leader could neither alienate national land nor expropriate an individual's interests without good cause. But the term is deceptive, for traditional authorities are clearly not trustees in the common-law sense of the word.⁵³ If a ruler were to abuse his position, for instance, landholders would have none of the remedies available to the beneficiary of a common-law trust.⁵⁴

A particularly tenacious misconception is the idea that customary tenure is communal,⁵⁵ a fallacy deriving from the deeply rooted belief that African society was organized on communistic or collectivist principles. Admittedly certain aspects of African life were (and still are) activated by a communitarian spirit,⁵⁶ but it does not follow that interests in land were communal.

While no exception can be taken to the word 'communal' if it is used to suggest only that an individual's entitlement to land flows from membership of a political

⁵⁰See the Privy Council decisions in *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 (PC) at 403-4 and *Sobhuza II v Miller* [1926] AC 518 (PC) at 525.

⁵¹*Amodu Tijani's* case supra at 404 exerted a powerful influence in this regard. *Sibasa v Ratsialingwa & Hartman* NO 1947 (4) SA 369 (T) at 390, however, held that: 'The concept that a chief may hold property only as a sort of trustee for the tribe is a modern one which owes its origin to European influences.' Cf Parker (n1) 98, who prefers to call the chief a 'guardian'. See, too, Kerr *The Customary Law of Immovable Property and of Succession* 37-8.

⁵²See the South African decisions in: *Noveliti v Ntwayi* 2 NAC 170 (1911); *Dyasi* 1935 NAC (C&O) 1 at 9 and *Gaboetloeloe v Tsikwe* 1945 NAC (C&O) 2. Cf *Luke* 4 NAC 133 (1920).

⁵³Kerr (n51) 38ff.

⁵⁴*Asante Property Law and Social Goals in Ghana* 109ff, for instance, notes that rulers cannot be compelled to render an account. Apart from deposition, there are no remedies for abuse of trust: *Asante* op cit 150. Rather than viewing the powers exercised by African leaders over land as a type of private-law institution, generated by contract or property, it is preferable to construe their powers as derivatives of political sovereignty, an interpretation that is borne out by *Sibasa v Ratsialingwa & Hartman* NO 1947 (4) SA 369 (T) at 390 and *Re Southern Rhodesia* [1919] AC 211 at 234. See too *Tito v Waddell* [1977] Ch 106.

⁵⁵See, for instance, Mills in Tötemeyer (n3) 104. It usually follows from this conception of customary tenure that the occupier of land has a life-time usufructuary right to use and enjoyment. See Parker (n1) 98. The most influential judgment in this regard is *Amodu Tijani v Secretary, Southern Nigeria* [1921] 2 AC 399 (PC) at 404, although *Sobhuza II v Miller* [1926] AC 518 (PC) at 525 also held that individual ownership was foreign to all systems of customary law: land belonged to the community. See Chanock in Mann & Roberts *Law in Colonial Africa* 66-8.

⁵⁶Manifested in the obligation of mutual support owed to all members of the extended family - Gluckman (n44) 162-3 and *Asante* (n54) 18-23 - and the neighbourhood work parties called to undertake large agricultural projects: Bourdillon *The Shona Peoples* 91-2; Schapera *Native Land Tenure in the Bechuanaland Protectorate* 195; Sheddick *Land Tenure in Basutoland* 83-6; Jeppe *Bophuthatswana: land tenure and development* 34.

community⁵⁷ (and while it may be appropriate to describe the tenure system of peoples like the San),⁵⁸ in strictly legal terms 'communal' is ambiguous. It can mean either that a right is held by a group of people jointly (by a single inseparable title) or by a group in common (each person having a separate but same title). Neither meaning reflects the actual tenure of residential sites and arable plots.⁵⁹

What makes 'communal' so objectionable is its connotation that customary tenure is primitive.⁶⁰ Because 'communal' tenure involved something less than the property rights of 'civilized' law, it gave colonial governments moral and legal justification to expropriate land without considering the interests of African landholders. This danger still exists.⁶¹ Modern constitutional lawyers may well be tempted to dismiss 'communal' customary rights as less worthy of protection than the right of individual ownership.⁶² In the circumstances, it seems unwise to continue to refer to land subject to customary law as 'communal' land.

Research into customary land tenures is further complicated by the fact that these systems have been changing.⁶³ In pre-colonial Africa, land tenure was conditioned by an abundance of land and a predominantly subsistence economy.⁶⁴ A decrease in the amount of land available - due mainly to segregation and partly to population growth, changes in agricultural technology and soil erosion⁶⁵ - has had a profound impact on attitudes to land and its control. Other influences on customary law have been the introduction of a capitalist economy and the common law (which has become the dominant system for all

⁵⁷Even so, there is nothing 'communal' about the allocation of land and its resources: the community's political leaders perform these tasks.

⁵⁸Whereby each member of a community has an equal right to benefit from land over which the group asserts a right to exclusive use (implying that other groups have no rights). See Schapera *The Khoisan Peoples of Southern Africa* 127.

⁵⁹See, for instance, Hamnett *Chieftainship and Legitimacy* 73. 'Communal' would be a fair description only of customary rights to pastureland and natural resources. See Kerr (n51) 53.

⁶⁰Chanock (1991) 32 *J Afr History* 70. See Cheater's analysis (1990) 60 *Africa* 188ff of use of the term 'communal' to describe Zimbabwean land tenure in both the colonial and post-independence periods.

⁶¹In Namibia, for instance, what were formerly called 'reserves', and then 'homelands', are now called 'communal lands'.

⁶²See the debate above on 'ownership' of communal lands in Namibia. It is notable, too, that art 98 of the Constitution, which lists the various types of 'ownership' constituting the Namibian economy, makes no mention of customary tenure.

⁶³Customary tenure now applies only in the reserves created during colonial and South African rule.

⁶⁴Which no doubt accounts for the former rule in Kavango that individuals were free to occupy any uncultivated land without first obtaining the permission of a land authority: Gibson, Larson & McGurk *The Kavango Peoples* 231. Today, however, land may be appropriated only after permission has been given: Hinz (n5) 37.

⁶⁵The plough in particular increased the amount of labour available, which led to various social and economic dislocations: Schapera *A Handbook of Tswana Law and Custom* 201 and (n56) 133; Sheddick (n56) 75-6.

property-related transactions). Whether and to what extent customary tenure has reacted to these forces of change has been neither fully documented nor judicially considered.⁶⁶

Any description of customary law, if it is to communicate to the widest possible audience and still remain true to the social data, must employ a simple and, as far as possible, a non-technical vocabulary. Words such as 'interests', 'rights' and 'powers' can be used instead of the common-law terms 'ownership', 'trust' or 'usufruct'; and, of course, a value-laden term, such as 'communal', must be avoided. A more neutral vocabulary will hopefully circumvent the groundless assumption that ownership is a universal and the only acceptable form of right to property.

To discover the fundamental elements of a system of land tenure three issues need to be examined.⁶⁷ The first is the conditions determining who may hold interests in land. In this respect, it has long been apparent in all parts of Africa that only persons who are affiliated to a political unit - whether a family, a ward or a nation - have 'a right of avail', ie an entitlement to the land within it.⁶⁸ Before they have any claim to land, outsiders must first be accepted as members of the polity.

The second issue concerns the object of tenure, for the nature of particular tracts of land has a strong influence on the type of rights and interests that are exercised over it. Fertile land, situated close to sources of water, usually attracts agriculture and thus individual rights. Drier, barren land is normally used for pasture, and the tendency is to allow all members of a community equal rights of grazing.

Thirdly, the content of the interest must be investigated. What are landholders allowed to do with their land, or what are the limitations and contingencies implicit in their interests? Here a useful distinction may be drawn between a right to benefit and a power of control. 'Benefit', which denotes a right to use and enjoy land, vests in the land user; 'control', which denotes the power to decide who may benefit from the land, when and in what circumstances, vests in a political authority.⁶⁹

⁶⁶Cf *Kweneng Land Board v Kabelo Matlho & Pheto Motlhabane* 10/91 Court of Appeal Botswana (noted in (1993) 37 *JAL* 192), which is considered below. The only detailed study of the impact of capitalism on customary law is Snyder's *Capitalism and Legal Change, an African Transformation* (1981), a work on the Casamance region of Senegal.

⁶⁷Allott in *Anderson Family Law in Asia and Africa* 122-4. These ideas are explored further in Bennett (n49) 174-5, MacCormack (n48) 1ff, and Bentsi-Enchill (1965) 9 *JAL* 114.

⁶⁸See Sheddick (n56) 32; *Hughes Land Tenure, Land Rights and Land Communities on Swazi National Land in Swaziland* 62; Jeppe (n56) 13-14; *Duncan Sotho Laws and Customs* 86-7; *Letsoalo Land Reform in South Africa* 19; Hamnett (n59) 65.

⁶⁹This distinction was drawn by Gluckman (n44) 88-91, who referred in turn to Sheddick (n56) 1ff. In both cases the distinction was between 'estates of administration and production', terms that meant much the same as 'control' and 'benefit'.

3 POWERS OF TRADITIONAL LEADERS

(a) Power of allotment

It follows from their role as leaders of the nation that traditional rulers have the power to control land use and to allot portions to members of the community.⁷⁰ Although in common parlance they are often said to be 'owners', they are certainly not owners in a common-law sense,⁷¹ since they may not alienate the land for which they are responsible.⁷²

Various enactments passed during the seventy years of South African rule, notably the Native Reserve Regulations of 1924, which removed the headmen's power to allot land and removal landholders,⁷³ circumscribed the powers of traditional authorities.⁷⁴ In practice, however, their position was not usurped, and the 1991 National Conference on Land Reform recognized the important role traditional leaders continue to play in the allocation and administration of land.⁷⁵

Traditionally, a ruler's most important power was land allocation.⁷⁶ Where a realm was structured into subordinate political units, however, the head of the nation

⁷⁰Amongst the peoples of Caprivi, however, villages consisting of genetically related kin have wide control over their lands: ancestral lands vest in the village and landholders enjoy a high degree of security relative to the central political authorities: Hinz (n5) 45.

⁷¹See Hinz (n5) 29 and 44. *Moraliswani v Mamili* 12 June 1985 SWA (unreported) at 23.

⁷²Hinz (n5) 29.

⁷³Sections 9(c) and 11 of GN 68 of 1924, respectively. See ch V(1)(b). While these powers were vested in superintendents, and are today vested in magistrates, traditional leaders in practice continue to exercise their customary powers. See Fuller & Turner *Resource Access and Range Land Management in Three Communal Areas of Namibia* 7 and 15.

However, s 19 of the 1930 Regulations Prescribing the Duties, Powers and Privileges of Chiefs and Headmen GN 60 of 1930 gave traditional authorities power to allot land, and these regulations were not expressly repealed by the Traditional Authorities Act 17 of 1995. The Bantu Areas Land Regulations R188 of 1969 gave commissioners general powers to allot and control land use, but these powers did not necessarily override the powers of traditional leaders, and, in practice, it seems that commissioners acted only in consultation with traditional authorities (and then only in respect of certain types of land, namely land used for public purposes as, for example, schools or churches): Hinz (n5) 27.

⁷⁴See the useful (if not authoritative) list compiled by Fuller & Turner op cit 11-13. Hinz (n5) 18-29 examines these enactments in detail and concludes that the amendments to the 1924 regulations made them inapplicable to most of the reserves in the territory. Fuller & Turner op cit 18 report that a surprising number of people on the land still consider that their permission to be on the land derives from traditional leaders.

⁷⁵But participants at the Conference (n18) felt that the role of traditional leaders must be properly defined under law. Accordingly, it was recommended that land boards be introduced to administer allocation of communal land and that land administration should be included in the powers of regional and local authorities: clause 18. See Van Wyk 1992 *SA Public Law* 37.

⁷⁶Hinz (n5) 29-30 says that even the power to grant a 'permission to occupy' under the 1969 Black Land Regulations is not exercised without the blessing of a traditional authority. Similarly, in Eastern Caprivi, chiefly permission is necessary to occupy land: Parker (n1) 97.

would seldom be personally responsible for making allotments,⁷⁷ for this power would be exercised by the next person in the hierarchy of authority, the wardhead (or headman).

Applicants are normally married men with families to support. Once they have been awarded tracts land, they can then make further allotments to wives and other dependants.⁷⁸ Allottees acquire a right to benefit from the plots they were given. This pattern of powers and rights is replicated in each political unit of the realm: all land is controlled by the head of the unit who is obliged to allot it to individual applicants.⁷⁹

Kavango used to be an exception to the rule requiring a specific act of allotment by a political leader, since any person could clear land and farm it without prior permission, provided that another person's rights were not infringed.⁸⁰ An abundance of land relative to the size of the population probably accounts for this regime. Nowadays, however, because less land is available, it must be allocated by chiefs in consultation with farming communities.

Certain customary procedures may govern the act of allotment. Major decisions affecting the entire community, for instance, are usually taken on the advice of elders or councillors,⁸¹ and in the case of land allocation the approval of an applicant's future neighbours may be sought.⁸² Whatever the position may be in particular systems of customary law, an allotment of land is an official administrative act, and as such it should be subject to the precepts of administrative law.⁸³

Although the non-commercial nature of customary law would imply that allotments should be gratuitous, a consideration is often paid.⁸⁴ In Owambo, it is said

⁷⁷Where most land has already been allotted, the authorities will do little other than approve transfers amongst the existing landholders.

⁷⁸Mills in Töttemeyer (n3) 104. And individuals would store their crops separately: Becker & Hinz *Marriage and Customary Law in Namibia* 65-6.

⁷⁹It is apparent, therefore, that customary law allows multiple interests to exist concurrently over the same tract of land.

⁸⁰None the less, those who did not belong to the polity had to obtain permission from a political authority to settle in the area: Parker (n1) 97. According to Hinz (n5) 45 the situation is similar in Caprivi. Cf Becker & Hinz (n78) 100, who speak of land being allocated by the khuta after investigation and determination of boundaries by the local headman. (And rights were individual to husbands and wives.) See Becker & Hinz (n78) 66 citing an unpublished thesis by Van Tonder (1966).

⁸¹Hinz (n5) 32.

⁸²Hinz (n5) 37 regarding Kavango. Marwick *The Swazi* 162; Hughes (n68) 129; Kuper *African Aristocracy* 48-9; Cross (1987) 4 *Development SA* 436. Cross in De Klerk *A Harvest of Discontent* 74 reports that the temptation is then to shorten the process of incorporation, whereby individuals alienate their land rights to outsiders by a purchase or lease.

⁸³Duncan (n68) 88 stresses that allotment is an administrative, not a judicial act. Because no one has any definite rights before an allotment is made, he would seem to be correct. See *Gaboetloeloe v Tsikwe* 1945 NAC (C&O) 2 and *Dlomo* 4 NAC 181 (1922) regarding allotment by the state. Cf Hamnett (n59) 64-5.

⁸⁴Hinz (n5) 38 regarding Kavango, and Becker & Hinz (n78) 100 regarding Caprivi. The case of Owambo cited below, seems to be an exception to the rule. Kuper (n82) 45 says that Swazi use the verb *kuphakela* to describe allotment; the same word is used to denote serving food, and every individual has a right to be fed.

that wards are 'sold' to headmen for cattle or cash and the headmen in turn 'sell' allotments to individuals who can afford to buy them. While this language may suggest a straightforward commercial transaction, the rights allotted are not absolute, since they are non-transferrable and on the death of a landholder they revert to the land authority for 'resale'.⁸⁵ Elsewhere, it may be difficult to determine whether payment of a consideration is bribery, a naturalization fee (for becoming a member of the political unit) or a 'gift' (betokening allegiance to a higher authority).⁸⁶

(b) Power to regulate common resources

Every member of a political unit has access to its common natural resources, in particular to pasture but also to wood (for building and fuel), grass and reeds (for thatching and weaving), clay (for pottery) and edible fruits and plants.⁸⁷ Similarly, natural sources of water are available to everyone.⁸⁸

The freedom to use common resources is subject to the local ruler's power to regulate access if and when this becomes necessary in the interests of the community as a whole.⁸⁹ To preserve a diminishing supply of timber, for example, the felling of trees may be prohibited indefinitely or for a specific period.⁹⁰ Customary law gives traditional authorities all the powers they need to conserve the environment, and there is ample evidence to show that they have reacted swiftly when resources were in danger of running out.⁹¹

(c) Power of removal

Consonant with their power to punish offenders and control access to land for the good of the community, traditional authorities have a power to order landholders (and occasionally even whole communities) to relinquish the land they were allotted.⁹² The reasons

⁸⁵Hinz (n5) 31-2.

⁸⁶Hamnett (n59) 72; Haines & Tapscott in Cross & Haines *Towards Freehold* 169-70; Bromberger in Cross & Haines op cit 208; Jeppe (n56) 24-5.

⁸⁷Hinz (n5) 33, 37 and 38; Schapera (n65) 211-13 and (n56) 44, 155 and 262-4; Hammond-Tooke *Bhaca Society* 150; Wilson & Mills *Keiskammahoek Rural Survey* 8; Letsoalo (n68) 23; Sheddick (n56) 10 and 113-15; Duncan (n68) 99-102; Ashton *The Basuto* 152; Hughes (n68) 140-1; Van Warmelo & Phophi *Venda Law* 1306-9; Jeppe (n56) 16.

⁸⁸Holleman in Colson & Gluckman *Seven Tribes of Central Africa* 370; Hammond-Tooke op cit 150; Mönning *The Pedi* 154; Sheddick (n56) 114; Schapera (n56) 245; Jeppe (n56) 16; Van Warmelo & Phophi op cit 1299 and 1311.

⁸⁹Rules concerning hunting are usually a special case. Although wild animals can be pursued anywhere, commoners are often prohibited from hunting certain species and they might be obliged to give rulers tribute from the spoils. See Schapera (n56) 44 and (n65) 211; Hughes (n68) 143; Kuper (n82) 150.

⁹⁰Hinz (n5) 33-4 and 42, respectively, regarding special enactments of the Owambo land authorities and Kavango.

⁹¹See Schapera (n56) 257; Hamnett (n59) 64; Sheddick (n56) 10 and 116ff; Duncan (n68) 75. Not much can be done, however, in the face of poverty and overpopulation. See, for instance, Preston-Whyte (1987) 4 *Development SA* 414-15.

⁹²While this power is not a feature of all systems of customary law, it seems widespread in southern Africa.

for issuing a removal order may be grouped into two categories. Under the first, the power is exercised for a general public purpose, which would include situations where land is needed for public works,⁹³ the soil is exhausted⁹⁴ or the holder has more land than necessary for subsistence.⁹⁵ In all but the last case, dispossessed landholders are usually given land elsewhere in the realm.

Under the second category, the purpose for issuing removal orders is to penalize landholders who committed offences.⁹⁶ The ostensible reason may be to preserve the peace, but the underlying motive is often to put down political dissidents who persistently flout a local ruler's authority.⁹⁷ A dispossessed holder may lose his or her right of avail altogether, a drastic punishment which amounts to expulsion from the nation.⁹⁸ Usually no compensation is paid for whatever improvements were made to the land; at most an offender would be allowed to dismantle buildings and to harvest the crops that happen to be standing in the fields.⁹⁹

The customary power of removal has both good and bad features. While a fair ruler can deprive landholders of their rights in order to discourage absenteeism or ensure an equal distribution of land,¹⁰⁰ the corrupt or unpopular ruler can threaten loss of land as a method of suppressing criticism.¹⁰¹ The main objection to customary law is its lack of any clear legal restraints on the abuse of removal powers. A procedural check of sorts exists in the practice of consulting councillors¹⁰² and in the requirement that reasons must

⁹³Myburgh & Prinsloo *Indigenous Public Law in KwaNdebele* 41-2.

⁹⁴Sheddick (n56) 170. See too Wilson & Mills (n87) 26 and Schapera (n56) 183.

⁹⁵In other words, surpluses may be expropriated. See Hamnett (n59) 68; Ashton (n87) 145-6; Prinsloo *Publiekreg in Lebowa* 137; Sheddick (n56) 155; Schapera (n65) 207 and (n56) 47 and 181-2.

⁹⁶The offence may be a violation of the rules governing use of land - for example, by starting to plough before permission is given - but more often orders are directed at landholders who have committed political offences. Myburgh & Prinsloo (n93) 42 and Prinsloo (n95) 137 say that a landholder may be dispossessed only for commission of several serious offences.

⁹⁷Ashton (n87) 149-50 and Sheddick (n56) 62 and 155.

⁹⁸Banishment could be the sanction for rejecting the authority of a ruler and his council: Prinsloo *Die Inheemse Administratiefreg van 'n Noord-Sothostam* 71 and 194-5 and (n95) 136-8. However, Myburgh & Prinsloo (n93) 29 report that banishment is so serious that only immigrants can be punished in this way, and then only for persistent disobedience to the law or for contempt of the ruler. Cf Kuper (n82) 149. See further Schapera (n56) 104-8; Letsoalo (n68) 22; Hughes (n68) 146-9.

⁹⁹Prinsloo (n98) 70 and (n95) 137; Hughes (n68) 228-9. And see Sheddick (n56) 72.

¹⁰⁰By the same token, however, frequent removals may generate a feeling of insecurity, especially amongst people who by hard work and good husbandry have been increasing their farming yields: Hamnett (n59) 76 and Hughes (n68) 149.

¹⁰¹See Haines & Tapscott in Cross & Haines (n86) 169-70 and Tapson (1990) 7 *Development SA* 572.

¹⁰²Or, if the order involves a number of families, the more representative national council: Myburgh & Prinsloo (n93) 41-2 and 63-4; Prinsloo (n98) 134-5 and (n95) 154; Mönning (n88) 284-5; Kuper *The Swazi* 36-8.

be given for decisions.¹⁰³ But consultation offers no more than an assurance that the issue was considered, and, although unanimity might be a general ideal,¹⁰⁴ a ruler is not bound by his council's advice.

An even more serious shortcoming would be the absence of a clear right of *audi alteram partem*. While a landholder might be allowed to make submissions to the leader in council, under certain systems of customary law, if the removal order was occasioned by commission of an offence, the landholder had no automatic right to a hearing.¹⁰⁵ South African courts often had cause to consider customary removal orders,¹⁰⁶ and they might have been expected to find the lack of an *audi alteram partem* rule incompatible with the principles of natural justice.¹⁰⁷ Surprisingly, this was not the view of the leading South African case: *S v Mukwevho; S v Ramukhuba*.¹⁰⁸ In fact, the courts did little more than confirm customary procedure, namely, that councils be consulted¹⁰⁹ and good and sufficient reasons be given.¹¹⁰

The leading case in Namibia on trekpas - *Ndisiro v Mbanderu Community Authority & Others*¹¹¹ - unfortunately did not have reason to consider the implications of customary law. The court held that headmen had no authority under customary law to issue removal orders, for their powers had been superseded by statute.¹¹² Arguably the power has now been restored by the Traditional Authorities Act.¹¹³ If this is the case,

¹⁰³The merits of which will obviously be debated in council. See, for example, *Kekane v Mokgoko* 1953 NAC 93 (NE).

¹⁰⁴Jeppe *Die Ontwikkeling van Bestuursinstellings in die Westelike Bantoegebiede (Tswana-Tuisland)* 128; Hughes (n68) 105.

¹⁰⁵Particularly where land is expropriated for public purposes. See Prinsloo (n98) 70 and 138 and (n95) 154. Where an offender is removed because of witchcraft, no hearing is allowed. Cf Myburgh & Prinsloo (n93) 42 and 63.

¹⁰⁶An institution they dubbed 'trekpas'. Although trekpas is widely reported in the ethnographic literature, South African courts did not assume its existence in all systems of customary law: *S v Mukwevho; S v Ramukhuba* 1983 (3) SA 498 (V) at 501. Hence it may happen, as in *Mosii v Motseoakhumo* 1954 (3) SA 919 (A), that a traditional leader is unable to prove that the system of customary law he relies upon permits trekpas, with the result that his removal order will be declared invalid.

¹⁰⁷Under the repugnancy proviso. Although no specific or technical meaning has ever been attached to 'natural justice' in this context, the courts generally understand it in its substantive sense (ie the *ius naturale*), not in a procedural sense: Peart 1982 *Acta Juridica* 106-7.

¹⁰⁸1983 (3) SA 498 (V) at 500-1. This case was consistent with previous judgments. See *Mokhatle & Others v Union Government* 1926 AD 71, *Phiri v Nkosi* 1941 NAC (N&T) 94 and *Kuena v Minister of Native Affairs* 1955 (4) SA 281 (T). *Kuena's* case dealt with the parallel removal power vested in the state by s 5(1)(b) of the Black Administration Act 38 of 1927.

¹⁰⁹*Mokhatle's* case *supra*.

¹¹⁰See *Kekane v Mokgoko* 1953 NAC 93 (NE). *S v Mukwevho; S v Ramukhuba* 1983 (3) SA 498 (V) at 500-1 held that both the ruler and council would be expected to be personally acquainted with the circumstances of the case.

¹¹¹1986 (2) SA 532 (SWA).

¹¹²At 537. The enactment in question was the Native Reserve Regulations GN 68 of 1924, which gave superintendents the power to allot and transfer land.

¹¹³Section 10(3)(d) of Act 17 of 1995.

removal powers will have to conform to the chapter on fundamental rights,¹¹⁴ in particular art 18, the provision on administrative justice:

'Administrative bodies and administrative official shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation'

When exercising removal powers, therefore, traditional authorities, as state officials making administrative decisions in the public interest, would be obliged to comply with common-law rules of administrative justice.¹¹⁵

4 INDIVIDUAL RIGHTS

(a) The right of avail

Anyone who is a member of one of the political subdivisions of a realm has a 'right of avail' to land within it.¹¹⁶ The authorities are obliged to provide land only for purposes of subsistence; they are under no duty to facilitate commercial farming (and land accumulation may even be discouraged). Thus individuals wanting land on which to build a house or grow crops have to approach the head of the unit to which they are attached.¹¹⁷ Strangers who have no affiliation to the unit through birth or family connection may first have to be inducted as members of the community,¹¹⁸ a procedure that might involve paying a type of naturalization fee.¹¹⁹

¹¹⁴In terms of s 11(1) of the Act. Subsection (a) of s 11(1) would suggest that the power should be totally abolished if it violated an individual's rights, as guaranteed by the Constitution or any other statutory law. But presumably this provision would be applicable only if the customary power, as opposed to its potential application, were in violation of fundamental rights. Subsection (b), the better alternative, provides that the customary power would be invalid only to the extent of an inconsistency with the Constitution or any other statutory law.

¹¹⁵There is authoritative South African precedent in *Saliwa v Minister of Native Affairs* 1956 (2) SA 310 (A) at 317 for such an approach. The applicability of all or only some of the common-law standards used to be contingent upon how the act or decision in question had been classified: the rule of procedural fairness could be invoked only in relation to acts deemed to be judicial or quasi-judicial. Certain South African cases, such as *Gaboetloeloe v Tsikwe* 1945 NAC (C&O) 2, considered orders of trekpas to be administrative rather than judicial. In *Masenya v Seleka Tribal Authority & Another* 1981 (1) SA 522 (T) at 525 and *Mokhatle & Others v Union Government* 1926 AD 71 at 77-8, the classification was by way of inference: the courts held that issuing an order of trekpas did not amount to an exercise of criminal jurisdiction. By treating trekpas as an administrative act, two classic precepts of procedural fairness - *audi alteram partem* and *nemo iudex in sua causa* - could be excluded. But this classification is almost certainly wrong, since exercise of a removal power clearly affects an individual's existing rights. The *nemo iudex* rule is, in any event, a precept of customary law: Prinsloo (n95) 164.

¹¹⁶Sheddick (n56) 32; Hughes (n68) 62; Jeppe (n56) 13-14; Duncan (n68) 86-7; Letsoalo (n68) 19; Hamnett (n59) 65.

¹¹⁷The applicant is assumed to be the head of a family. See Hughes (n68) 67-8; Kuper (n82) 46 and 149; Marwick (n82) 161; Reader *Zulu Tribe in Transition* 65; Jeppe (n56) 18-20; Ashton (n87) 144; Wilson & Mills (n87) 13; Sheddick (n56) 11, 51ff and 157ff; Duncan (n68) 87; Schapera (n65) 197-8 and (n56) 44.

¹¹⁸Schapera (n56) 40, 45 and 63; Bourdillon (n56) 86; Reader (n117) 67; Ashton (n87) 144; Hughes (n68) 130-1; Holleman in Colson & Gluckman (n88) 373. Normally an outsider will be

Access to land and the right of avail should be distinguished. Because the responsibility for establishing and maintaining a family falls to adult, married males, they would be the persons to petition a wardhead for land.¹²⁰ Family dependants have only indirect claims - or access - through the head of a household.¹²¹

It would be in keeping with the patriarchal character of customary law - senior men control property and hold positions of authority - that women have no right of avail.¹²² As members of a family, of course, they have *access* to land via the familyhead, who in terms of his general duty of support would be obliged to allot wives plots of land on which to maintain themselves and their children.¹²³ This is how the law should in principle operate. Yet abundant evidence is available to indicate that independent women hold land on their own account.¹²⁴ In places like Kavango, for instance, it is said that women suffer no discrimination and have equal access to land.¹²⁵

Applicants for land have an entitlement only to an unspecified amount in an unspecified place.¹²⁶ The right of avail does not necessarily give them a right to choose where to live or to farm.¹²⁷ Nor may landholders move existing homesteads to new locations within the ward.¹²⁸ Greater flexibility may previously have been possible, but today problems of land shortage tend to restrict both freedom of choice and mobility.

In deciding how much land to allot, rulers are guided principally by the criterion of family subsistence. Hence the amount of land that an individual will obtain is determined by reference to the present and future needs of a family.¹²⁹

introduced by an existing resident: Wilson & Mills (n87) 10; Sheddick (n56) 32; Cross in De Klerk (n82) 74.

¹¹⁹Hammond-Tooke (n87) 146; Letsoalo (n68) 20; Mönnig (n88) 153-4; Jeppe (n56) 34.

¹²⁰Jeppe (n56) 14, 21-2 and 24.

¹²¹Sheddick (n56) 69 and 160-2.

¹²²Marcus (1990) 6 *SAJHR* 179-80.

¹²³Dependent widows, mothers, and possibly even divorcées or adult unmarried daughters would also be entitled to claim a plot. See Kuper (n82) 149; Schapera (n65) 202 and (n56) 46 and 81-2; Mönnig (n88) 153; Holleman in Colson & Gluckman (n88) 362; Wilson & Mills (n87) 10; Duncan (n68) 87 and 90-1. Hamnett (n59) 70 doubts, however, whether these domestic allotments would be recognized outside the family, for example, when the familyhead dies.

¹²⁴See Becker & Hinz (n78) 100, where traditional authorities in Caprivi say that, although women are not specifically discriminated against, they are normally required to live with other families - a rule that is not applied to males. See, too, Schapera (n56) 150; Letsoalo (n68) 20; Sheddick (n56) 164.

¹²⁵None the less, land is still said to be 'owned' by husband: Becker & Hinz (n78) 66-7.

¹²⁶Hughes (n68) 64.

¹²⁷In the past, when land was plentiful, however, an individual might simply appropriate virgin land within the ward: Holleman in Colson & Gluckman (n88) 363.

¹²⁸Cf *Kaputuaza & another v Executive Committee of the Administration for the Hereros & others* 1984 (4) SA 295 (SWA), which held that under Herero customary law no formalities were necessary to move stock or change residence.

¹²⁹See Hamnett (n59) 65; Schapera (n65) 200 and (n56) 47. The size of a homestead will, of course, fluctuate in response to changes in the composition of the family: Hamnett (n59) 67 and 71 and Sheddick (n56) 157ff.

The head of a household is generally allotted two types of land, a residential site, dedicated to housing the family and to small-scale, domestic gardening,¹³⁰ and one or more arable plots for cultivating cereal crops and vegetables.¹³¹ Once land has been allotted, the individual landholder has an exclusive right of use/benefit, which is secure both against local rulers¹³² and private trespassers.¹³³

(b) Transfer of interests

(i) *Death of the holder*

Implicit in the concept of inheritance (ie transmission of a deceased person's property to his or her heirs) is an assumption that a deceased's rights in an estate were individual and indefeasible.¹³⁴ If landholders do not 'own' their land - in the sense that they may not alienate it to whomever they choose - then land cannot form part of a deceased estate. In theory at least, the holder's rights would expire on death so that the allotment becomes vacant and available for redistribution.¹³⁵

This is the theory. In many areas the reality is quite different. When a landholder dies, his family normally remains on the land. This may be permitted by certain systems of customary law or it may simply be a practice (borne of land shortage) running contrary to the accepted rule. In either case, rulers have usually had to bow to the inevitable and allow members of a deceased landholder's family to continue occupation.¹³⁶

¹³⁰Sheddick (n56) 77-8; Wilson & Mills (n87) 32 and 35; Marwick (n82) 163; Schapera (n65) 198. Gardens are small areas, intended to supply immediate domestic needs, but there has been a trend in recent years for the size of gardens to increase, for irrigation systems to be laid and for cash crops and livestock to be raised on them.

¹³¹Wilson & Mills (n87) 8 and Mönnig (n88) 155.

¹³²Their power to issue removal orders is an exception to this rule. See above.

¹³³Hammond-Tooke (n87) 146; Bourdillon (n56) 86.

¹³⁴As Hughes (n68) 97 says, to acknowledge the heritability of land would be to put land into the same class as private property. It is significant, therefore, that variations of the maxim - land is not an inheritance - are found in most systems of customary law in southern Africa. Holleman *Shona Customary Law* 322 attributes this principle to the system of shifting agriculture, a form of cultivation that was not conducive to establishing permanent rights.

Kavango and Caprivi seem to be exception to the rule, for Becker & Hinz (n78) 101 say that land there can be inherited, although transfers are still subject to the approval of a traditional leader: Becker & Hinz (n78) 100. See too Duncan (n68) 92 and Ashton (n87) 149.

¹³⁵This process is described as 'reversion'. See Hammond-Tooke (n87) 147; Wilson & Mills (n87) 12. Evidently amongst the Owambo the heir has no more than a 'right of first refusal' to acquire the deceased's right: Parker (n1) 99.

¹³⁶Hinz (n5) 38 regarding Kavango. In 1993, the Ndonga King's Council decided to allow widows the right to remain on their deceased husband's lands without further payment: Becker & Hinz (n78) 67. See further: Jeppe (n56) 32; Marwick (n82) 162; Schapera (n65) 204-5 and (n56) 46, 81 and 87-8; Sheddick (n56) 155; Duncan (n68) 92; Ashton (n87) 149; Reader (n117) 71. Cf Hamnett (n59) 77-82.

Whether shifts in practice should be accorded normative weight is undecided.¹³⁷ Two solutions are possible. The first would be the straightforward step of holding that inheritance of land is permissible under customary law. This solution would have far-reaching implications for customary tenure generally, for it would strengthen individual rights to allotments and support the argument that customary interests should be assimilated to common-law ownership.¹³⁸ The second, a less drastic approach, would be to treat current usage as a *tacit* redistribution of the land by the land authority.¹³⁹

(ii) *Alienation*

In pre-colonial Africa land was considered a God-given resource that could not be permanently appropriated by any one person.¹⁴⁰ The consequent bar on alienation has remained deeply ingrained in African consciousness,¹⁴¹ in spite of land shortage, the attractions of commercial farming and rural poverty.¹⁴²

People have always allowed neighbours or kinfolk in need to use their plots,¹⁴³ and fellow villagers often co-operate in farming ventures.¹⁴⁴ Provided the transfers of

¹³⁷Some writers claim that inheritance has become an established feature of certain systems of customary law. Thus Mönning (n88) 154 and Schapera (n65) 199 say that land passes from one generation to the next. See too Jeppe (n56) 32 and Reader (n117) 71. The issue was debated in an unreported case from Nigeria, *Gargati v Cham* (1980) (discussed in 1983 *Nigerian Current LR* 22) with reference to the difficulty of proving changes in customary law and application of the repugnancy proviso.

As far as a widow is concerned, South African courts have been quite prepared to sanction her continued occupation of her deceased husband's allotment. The only issue was how to interpret the nature of her right. According to one line of thinking, the right is real, although the courts stopped short of calling widows 'owners' of the land. They variously described the rights as usufruct (*Noveliti v Ntwayi* 2 NAC 170 (1911)), usus (*Dyasi* 1935 NAC (C&O) 1) and habitatio (*Sijila v Masumba* 1940 NAC (C&O) 42 at 45). *Luke* 4 NAC 133 (1920), however, held that the term usufruct has no equivalent in customary law and that it should never have been introduced.

There is strong, albeit dated authority in South Africa for a view more in accord with customary law: that widows acquire no more than a personal right against the heir to maintenance out of the estate: *Sijila's case supra*; *Dodo v Sabasaba* 1945 NAC (C&O) 62; *Myuyyu v Nobanjwa* 1947 NAC (C&O) 66.

¹³⁸Which will in turn have implications regarding the alienability of land.

¹³⁹Hammond-Tooke (n87) 147; Wilson & Mills (n87) 12-13. This was the court's understanding in *Mogapi v Mokua* 1948 NAC 4 (C). According to Hamnett (n59) 78ff, traditional courts would not regard the conflict between administrative discretion and the rules of customary law as insoluble. They would exploit the flexibility offered by this contradiction to achieve substantive justice in particular cases.

¹⁴⁰See Hinz (n5) 37 citing the Mbukushu, and Elias *Nigerian Land Law* 147-8.

¹⁴¹Hinz (n5) 38; Ashton (n87) 149; Jeppe (n56) 15; Bourdillon (n56) 86; Sheddick (n56) 11; Schapera (n65) 205 and (n56) 46 and 149, 152 and 178-9; Wilson & Mills (n87) 8.

¹⁴²The African attitude to alienability might have been entirely eclipsed, were it not for the creation of reserves, in which customary law was shielded from the developing real estate market in the rest of the country.

¹⁴³Wilson & Mills (n87) 31; Letsoalo (n68) 23; Hughes (n68) 135-6; Ashton (n87) 149; Schapera (n65) 203-4 and (n56) 151 and 179; Hamnett (n59) 72-3; Sheddick (n56) 159.

land involved in these transactions are for limited periods, no objection would be raised. Even permanent transfers may be permitted under customary law,¹⁴⁵ but the landholders concerned would then need the approval of their local ruler.

Everyone pays lip service to the ethic of customary law - that land transactions should be gratuitous - but some form of consideration may well be demanded.¹⁴⁶ Whether the customary prohibition on alienation is to be enforced in the face of evasion has not yet been settled.¹⁴⁷ Precedent in Namibia is lacking¹⁴⁸ and academic opinion elsewhere is divided.¹⁴⁹ The decision is obviously a difficult one, for it will have profound legal and economic repercussions.

A rare southern African case to examine this issue, *Kweneng Land Board v Kabelo Matlho & Pheto Motlhabane*,¹⁵⁰ did not fully consider these implications. The majority of the Botswana Court of Appeal held that customary interests had ripened into individual and absolute rights in land, the equivalent of common-law ownership, such as would permit sale and inheritance. But the decision was narrowly based on evidence led and on a concern not to perceive customary law as a fixed and static system.

A dissenting judgment by Bizos JA posed an important question, overlooked by the majority of the Court, and on which no evidence had been produced: why was only one member of the landholding family deemed to have full rights in its land? Customary law facilitates the construction of multiple interests over land. Not only do familyheads and individual family members have rights of benefit but political authorities also have powers of control and allotment. It is quite arbitrary to permit only one interest holder to dispose of an object over which others are exercising concurrent rights and powers.¹⁵¹

Bizos's concern suggests that it is legally impossible to allow alienation of residential and arable allotments in customary law without upsetting the entire system of

¹⁴⁴Share-cropping agreements are especially common: Hamnett (n59) 73; Jeppe (n56) 30; Wilson & Mills (n87) 26-8; Duncan (n68) 95.

¹⁴⁵An allotment may be exchanged, for instance, so as to be closer to kinfolk or cattleposts (Ashton (n87) 149), or it may be donated to a relative or friend (Schapera (n65) 203 and 205).

¹⁴⁶The mercenary purpose of these arrangements could easily be disguised, with the result that it would be difficult to determine whether a gratuitous transaction has been converted into a commercial one. See Hughes (n68) 228; Hamnett (n59) 84; Jeppe (n56) 31; Wilson & Mills (n87) 29-31 and 37.

¹⁴⁷In West Africa, by way of contrast, it has been held that alienation is now perfectly permissible under certain systems of customary law. See the Nigerian cases, *Chukwueke v Nwankwo* [1985] 2 NWLR 195 (SC) and *Folarin v Durojaiye* [1988] 1 NWLR 351 (SC) at 364, and discussion by Agbosu (1981/2) 13/14 *Rev Ghana L* 35.

¹⁴⁸In the only South African case on point - *Gaboetloeloe v Tsikwe* 1945 NAC (C&O) 2 - the court held that individual rights were precarious and personal and that alienation was 'in conflict with the very basis of the original grant'.

¹⁴⁹Kerr (n51) 59ff claims that individuals 'own' their residential/arable allotments and may thus sell them. Cf Jeppe (n56) 15.

¹⁵⁰Discussed in (1993) 37 *JAL* 193. The court was asked to decide whether, in terms of a local statute, customary interests should be conceived as land 'held by any person in his personal and private capacity'.

¹⁵¹The *nemo dat quod non habet* principle is also relevant here: can the head of a household dispose of interests he does not have?

tenure. Alienability presupposes one person's freedom to use and dispose of property at will. Where landholders have both rights and duties, some owed to family members and some to the political authorities, an unrestricted freedom to dispose of property is not juridically feasible. Even under common law, while *rights* can be freely ceded, duties cannot.¹⁵²

5 CUSTOMARY INTERESTS AND THE CONSTITUTION

In all western systems of law, predicated as they are upon laissez-faire capitalism, individual property rights are treated as sacrosanct¹⁵³ - although the state always has the power to expropriate in the public interest provided that due process is observed and compensation paid.¹⁵⁴ Article 16 of the Namibian Constitution reflects the typical western approach to property rights.

'(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.'

'(2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament.'

As far as customary law is concerned, the most important question is whether the 'right to acquire, own and dispose of all forms of immovable and movable property' in subsection (1) will include customary interests, especially the right of avail and the individual's right to benefit from land already allotted. Given the difficulty of expressing customary concepts in common-law terms, such interests might well be regarded as too ephemeral or too precarious to warrant constitutional protection.¹⁵⁵

¹⁵²Not at least without the consent of the person to whom they were owed and then not to persons who have no affiliation to the political community. According to Yoruba law, for example, a person who purported to sell land held under customary title would forfeit the land for abusing the political superior's act of generosity in supplying land: Omotola (1975) 6 *Nigerian J Contemp L* 44ff.

¹⁵³For example, art 17(1) of the Universal Declaration provides (somewhat ambiguously) that every person has 'a right to own property'. Article 21(1) of the American Convention on the Rights of Man states that each person has the 'right to use and enjoyment' of his or her property and art 14 of the African Charter says that '[t]he right to property shall be guaranteed'.

¹⁵⁴*Davies & other v The Minister of Land, Agriculture and Water Development* 1995 (1) BCLR 83 (Z).

¹⁵⁵In cases such as *Re Southern Rhodesia* [1919] AC 211 at 233-4 and *Milirrump v Nabalco Pty Ltd* (1971) 17 FLR 151, the courts felt that indigenous forms of tenure could not be compared with the 'civilized' concept of ownership, and hence they could not be recognized.

There is an ominous precedent for this attitude in certain southern African cases, where the courts declared that, because 'ownership' was unknown to customary law, the common law had to be applied in its place: *Komo & Another v Holmes NO* 1935 SR 86 at 94, *Mhlonga v Dube & another* 1950 NAC 164 (NE), *Nhlanhla v Mokweno* 1952 NAC 286 (NE), *Dokotera v The Master & Others* 1957 R&N 697 (SR) and *Gwebu* 1961 R&N 694 (SR).

In terms of the common-law definition of ownership - which includes the classic rights to possess, use and enjoy a thing, the powers to transfer, waive, and abandon rights, and the liberties to consume and destroy¹⁵⁶ - it is clear that customary interests fall far short of a western property right. They are granted and exercised subject to the contingencies of belonging to a political/family unit. Unlike owners of property in common law, customary landholders are generally not free to alienate their rights or to use their land as they wish.¹⁵⁷ On this reasoning, customary interests are not covered by the Constitution.

Article 16 may be the product of western jurisprudence, but in applying it we need not be bound by the traditional common-law definition of proprietary rights. Constitutional jurisprudence abroad indicates that a narrow interpretation of similar property provisions is unwarranted, for excludability, or the right to keep an object to oneself, is the major criterion for determining what rights deserve protection.¹⁵⁸ What is more, the protection of culture under art 19 and the norm of equal treatment under art 10 suggest that customary interests cannot be dismissed as constitutionally irrelevant.

Accepting, then, that customary land interests do fall within the ambit of art 16, the next question will be whether the clause in subsection (1) - 'All persons shall have the right ... to acquire, own and dispose of all forms of immovable and movable property' - gives women a right of avail to land on a par with men. (No problem of horizontality arises here, because claims would be asserted against the traditional leaders, who are organs of state exercising public-law powers.) When art 16 is read together with art 10(2) of the Constitution, the non-discrimination clause, the answer must be that women have the same right to land as men.¹⁵⁹ Under similar circumstances, a Tanzanian court had no hesitation in condemning a rule of Haya customary law (which prohibited female gatees from selling clan land) as discriminatory and thus unconstitutional.¹⁶⁰

A more difficult question is whether art 16(1) permits landholders to dispose of their customary interests by sale, lease or will. Again, because traditional rulers are organs of state, there would seem to be no obstacle to applying a fundamental right. Nevertheless, two reasons can be advanced for not allowing art 16 to override customary law. In the first place, it would be in conflict with the right to culture in art 19, and there would be no cause to restrict art 19 on grounds of 'the rights of others or the national

¹⁵⁶Lewis (1992) 8 *SAJHR* 401 citing Honoré in Guest *Oxford Essays in Jurisprudence* (1961) 107.

¹⁵⁷Because approval of a political authority is required: Van der Walt (1990) 23 *De Jure* 9-10.

¹⁵⁸Lewis (n156) 402 citing Gray (1991) 50 *Cambridge LJ* 252. Murphy (1993) 26 *CILSA* 217 also cites Gray: "'Property' is the power-relation constituted by the state's endorsement of private claims to regulate the access of strangers to the benefits of particular resources.' Van der Walt (1992) 8 *SAJHR* 433 and 435 argues that land rights cannot and should not be defined in terms of the traditional common-law ownership paradigm, for to do so would have the effect of setting a standard to which all other rights have to conform.

¹⁵⁹Moreover, art 14(2) of the International Convention on Elimination of All Forms of Discrimination against Women obliges states to ensure that rural women have the right to equal treatment in land matters and agrarian reform. A right of avail to land could be justifiably limited, however, in the case of juniors (ie young, unmarried males and females) on the ground that they have no dependants to support.

¹⁶⁰*Ephrahim v Pastory & Another* Civ App 70 of 1989 HC (reported in (1991) 35 *JAL* 205 and 87 *ILLR* 106). See Mtengeti-Migiro (1991) 24 *Verfassung und Recht* 362.

interest'.¹⁶¹ To the contrary, the common weal of many communities might be seriously damaged if landholders were to sell their interests on an open property market.

In the second place, were alienation to be recognized as a constitutional right, we have no indication who would be entitled to exercise the right. As we have seen, it is arbitrary to allow a familyhead exclusive powers of alienation, when his wife, children and other dependants have concurrent interests in the land concerned.¹⁶² Surely acquired rights such as these deserve protection?

Article 16(2) allows the state to expropriate property, provided that it is done 'in the public interest subject to the payment of just compensation'. In this regard, a distinction must be drawn between the state's power to 'police' or control property and its power of eminent domain.¹⁶³ The former denotes regulation of the use of property in order to protect citizen from citizen, while the latter refers to the appropriation of private rights for broader public purposes. Because an exercise of police powers does not entail the extinction of individual property rights, no compensation is payable.¹⁶⁴ Holders whose rights are expropriated, however, must always be reimbursed.¹⁶⁵

Article 16 speaks only of expropriation, which suggests that police powers were not contemplated. If this is so, the traditional authorities' analogous power to control use of resources - which is codified in s 10(2)(c) of the Traditional Authorities Act¹⁶⁶ - will be unaffected. Their removal power is also preserved in this clause. Subsection (2) of art 16 of the Constitution states that 'a competent body or organ authorised by law' may expropriate (and customary law would provide sufficient authorization).¹⁶⁷

One final matter should be noted. Land within areas ruled by traditional leaders has never been available to all and sundry;¹⁶⁸ only people accepted as members of the polity have a right of avail. The customary rule is contradicted by both art 16(1), which

¹⁶¹Where land rights are transferred, the transaction usually needs the approval of a traditional ruler, and even then transfers normally occur amongst members of the political unit. Outsiders may acquire rights only by becoming members of the polity.

¹⁶²This was the argument put by Bizos JA in *Kweneng Land Board v Kabelo Matlho & Pheto Motlhabane* reported in (1993) 37 JAL 193. See further Bennett & Roos (1992) 109 SALJ 463-7.

¹⁶³Murphy (n158) 218-19.

¹⁶⁴See *Cape Town Municipality v Abdulla* 1976 (2) SA 370 (C) at 375.

¹⁶⁵*Pennsylvania Central Transportation Co v New York City* 438 US 104 (1978) dealt with the factors determining whether an expropriation requires compensation or not.

¹⁶⁶The provision is cast as a duty: 'to ensure that the members of their traditional community use the natural resources at their disposal on a sustainable basis and in a manner that conserves the environment and maintains the ecosystems, for the benefit of all persons in Namibia.'

¹⁶⁷However, the requirement of just compensation would have to be fulfilled. Where a removal order is issued pursuant to commission of an offence, the matter is one of penal *confiscation* rather than expropriation, and so would fall outside the ambit of art 16(2).

¹⁶⁸In the Rehoboth Gebiet Proc 9 of 1928, for instance, the South African administration acknowledged the right and title of the Rehoboth community to the land that they occupied under the Rehoboth Gebiet Proc 28 of 1923. Section 6(2) of the 1928 Proclamation provided that: 'no person other than a member of the Rehoboth community shall be permitted to acquire any interest in immovable property situated in the Gebiet, whether leasehold or freehold, save with the consent of the Administrator.'

provides that 'all persons shall have the right in any part of Namibia to acquire ... all forms of immovable property', and art 21(1)(h), which provides that 'all persons shall have the right to reside and settle in any part of Namibia'.¹⁶⁹

Although (in line with art 21(1)(h))¹⁷⁰ the 1991 National Conference on Land Reform resolved that all Namibian citizens should have the right to live wherever they choose,¹⁷¹ it also decided that commercial farmers should not be allowed access to communal grazing nor should communal farmers who acquire commercial farms be allowed to retain their right to communal grazing.¹⁷²

In the Australian case of *Gerhardy v Brown*,¹⁷³ a more principled answer was given to the question whether strangers may be excluded from areas reserved for indigenous peoples:

¹⁶⁹The latter is a problem noted in para 6.1.4 of the Kozonguizi Report *Commission of Inquiry into Matters relating to Chiefs, Headmen and Other Traditional or Tribal Leaders*.

¹⁷⁰Which allows everyone the freedom to reside and settle in any part of Namibia'.

¹⁷¹(n18). In seeking access to communal land, however, applicants should take into account the rights and customs of people already living there and priority should be given to the landless and those without adequate subsistence: clause 13.

¹⁷²(n18) clause 21.

¹⁷³(1985) 159 CLR 70. South Australian legislation had granted land to members of an Aboriginal group and had allowed only members of this group right of access. Brown, an Aboriginal from New South Wales, and therefore excluded from the reserve, argued that to permit only members of a specific ethnic group to enjoy rights was a form of racial discrimination in conflict with the Commonwealth Racial Discrimination Act of 1975 (which gave effect to the International

When challenged as discriminatory, the court held that exclusion was valid, for it qualified as a species of affirmative action in favour of an aboriginal population.¹⁷⁴ (A need to conserve resources would be another legitimate reason.)¹⁷⁵ While on this reasoning traditional authorities may restrict land to those persons who are already connected by birth or family to a polity, the strong stance taken against racial discrimination in the Namibian Constitution would suggest that race is not a permissible ground.¹⁷⁶

Convention on the Elimination of all Forms of Racial Discrimination (1966)). The High Court conceded that, while the relevant legislation discriminated on grounds of race, it did so validly, because it was a 'special measure' permitted under s 8 of the Commonwealth Act (and art 1(4) of the International Convention).

¹⁷⁴See, too, the American decisions: *Morton v Mancari* 417 US 535 (1974) and *US v Antelope* 430 US 641 (1977).

¹⁷⁵In this regard, see the *Lovelace Case* Report of the Human Rights Committee, GAOR 36th Sess. Supp No 40 (A/36/40) Annex XVII 166; (1985) 68 ILR 17.

¹⁷⁶Article 21(1)(h) also conflicts with the power of traditional leaders to determine where land is to be allotted. In this respect, however, customary law would constitute a legitimate limitation of the freedom, since it is akin to common-law zoning regulations.

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